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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~1027~~ 167

UNION RURAL ELECTRIC ASSOCIATION, INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, members of said Commission; and COLORADO CENTRAL POWER COMPANY;

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF COLORADO

MORRISON SHAFROTH
Attorney for Petitioner
730 Equitable Building
Denver 2, Colorado

INDEX

	Page
Prayer for granting of writ of certiorari	1
The opinions below	1
Jurisdiction of the Supreme Court	2
Provisions of constitutions and statutes involved	2
Questions presented	4
Statement of the case	6
Preliminary summary	6
History of the litigation	7
Public Service complaint	8
The Supreme Court decision	8
The dissenting opinion	9
The petition for rehearing	10
How federal questions were raised	10
Reasons for granting the writ	11
As between the parties the decision of the Colorado Supreme Court is without legal justification, disregards the public interest, and is ill-founded	11
All other rural electrical associations in Colorado are adversely affected and their rights seriously limited by the decision	13
The decision threatens all rural electric associations in the United States	15
The fact that a United States statute has been interpreted to mean something different from its stated terms is an added reason for the decision being considered of great public importance	15
In the light of long continued public advertising by the private companies this decision assumes great importance	16

Page

The United States is the banker for the rural electric associations and the security of its loans is definitely threatened by this decision 16

It appears that this decision has been improperly influenced by political or economic theories of the majority members of the court 17

Appendix

Exhibit A:
Opinion and order of PUC 1a

Exhibit B:
Findings and judgment of Denver district court ...44a

Exhibit C:
Opinion of Colorado Supreme Court 53a

Exhibit D:
Dissenting opinion of three judges 70a

Exhibit E:
Order and judgment of Supreme Court 84a

Exhibit F:
Petition for rehearing on behalf of Union 85a

Exhibit G:
Order denying rehearing 90a

Exhibit H:
Map, in envelope, back cover

TABLE OF CASES

IN APPLICATION

Page

Missouri P. & L. Co. v. Lewis County R.E.C.A.
235 Mo. App. 1056; 149 S.W.2d 881 16

Upshur R.E.C.C. v. State (Texas Civ. App.)
289 S.W.2d 819 16

IN DECISIONS IN APPENDIX

Arkansas-Louisiana Coop. v. Pub. Serv. Comm.
210 Ark. 84; 194 S.W.2d 673 ..... 74a

Baker v. Lake City L. & P. Co.
3 PUR-3d 97 ..... 74a

Bookhart v. Central Elec. Coop.
219 S.C. 414; 65 S.E.2d 781 ..... 74a

Chicago Rys. Co. v. Commerce Comm.
336 Ill. 51; 167 N.E. 840 ..... 67a

Colorado Springs v. P.U.C.
86 PUR-NS 57 ..... 74a

Colorado Utilities Corp. v. P.U.C.
99 Colo. 189; 61 P.2d 819 ..... 21a, 60a, 62a

Consolidated Flower Inc. v. Civil Aer. Board
215 F.2d 814 ..... 74a

Davis v. People
79 Colo. 642; 247 Pac. 801 ..... 73a, 74a, 75a

Egyptian Transp. System v. L. & N. R. Co.
321 Ill. 580; 152 N.E. 510 ..... 67a

Englewood v. Denver
123 Colo. 290; 229 P.2d 667 ..... 20a, 60a, 62a

Page

Industrial Gas Co. v. P.U.C.
135 Ohio St. 408; 21 N.E.2d 166 ..... 74a

In Re Plumas-Sierra Coop.
88 PUR-NS 506 ..... 75a

Natural Gas Service Co. v. Surv-Yu Coop.
69 Ariz. 328; 213 P.2d 677;
70 Ariz. 235; 219 P.2d 234 ..... 74a

Ohio & Colo. Co. v. P.U.C.
68 Colo. 137; 187 P. 1082 ..... 27a

Parrish v. P.U.C.
134 Colo. 192; 301 P.2d 343 ..... 20a, 49a, 60a, 62a

People v. Pirie
78 Colo. 361; 242 Pac. 72 ..... 81a, 82a

Peoples Tel. Exchange v. Pub. Service Comm.
239 Mo. App. 166; 186 S.W.2d 531 ..... 68a

P.U.C. et al. v. City of Loveland
87 Colo. 556; 289 Pac. 1090 ..... 15a, 29a, 66a

Rural Electric Co. v. State Board of Equalization
57 Wyo. 451; 120 P.2d 741 ..... 74a

South Suburban Co. v. Levin
269 Ill. App. 323 ..... 66a

Terminal Cab Co. v. Kutz
241 U.S. 252; 36 Sup.Ct. 583 ..... 73a

IN THE

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No.:.....

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PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO: RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, members of said Commission; and COLORADO CENTRAL POWER COMPANY;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner, Union Rural Electric Association, Inc., prays that a writ of certiorari be issued to review the final order made and entered April 11, 1960, by the Supreme Court of the State of Colorado, and the judgment and opinion underlying such order made and entered March 14, 1960.

THE OPINIONS BELOW

The opinion and judgment of the Supreme Court of the State of Colorado, of March 14, 1960, has not been reported

other than in the mimeographed "Advance Sheets" of opinions published by the Colorado Bar Association, Volume 12, Number 14. This opinion appears herein as Appendix C.

The opinion of the District Court of the City and County of Denver, State of Colorado, appears herein as Appendix B. It has not been reported.

The opinion and orders of the Public Utilities Commission of the State of Colorado appear herein as Appendix A, and are reported in 17 P.U.R. 3d 160.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado was dated and entered March 14, 1960. Rehearing was denied April 11, 1960. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3); and under No. 19-1-(a) of the Revised Rules of the Supreme Court of the United States.

PROVISIONS OF CONSTITUTIONS AND STATUTES INVOLVED

1. From Federal Constitution:

   "Nor shall any state deprive any person of . . . property without due process of law; nor deny to any person . . . the equal protection of the law."

   From Amendment XIV of the Constitution of the United States.

2. From Federal Statutes:

   "The Administrator [of the 'Rural Electrification Administration'] is authorized and empowered to make loans . . . for rural electrification and the furnishing of electrical energy to persons in rural areas who are not receiving central station service . . . "

   U.S.C.A. Title 7, § 902, Ch. 31.

"The Administrator [of the 'Rural Electrification Administration'] is authorized and empowered . . . to make loans for rural electrification to . . . corporations . . . and cooperative, nonprofit, or limited-dividend associations . . . for the purpose of financing the construction and operation of . . . electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service . . . "

U.S.C.A. Title 7, § 904, Ch. 31.

"As used in this chapter [31] the term 'rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both farm and non-farm population thereof; . . . "

U.S.C.A. Title 7, § 913, Ch. 31.

3. From Colorado Statutes:

"The term 'public utility,' when used in Articles 1 to 7 of this chapter [115], includes every . . . electrical corporation . . . operating for the purpose of supplying the public for domestic, mechanical or public uses, . . . "

C.R.S. 115-1-3.

"No public utility shall begin the construction of a new facility, plant or system, or of any extension of its facility, plant or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. [This section] shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have there-

tofore lawfully commenced operations, or for an extension into territory either within or without a city and county or city or town, contiguous to its facility, or line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any such public utility, in constructing or extending its line, plant or system shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions, or prescribing such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable."

C.R.S. 115-5-1.

QUESTIONS PRESENTED

1. Has the Colorado Supreme Court denied the petitioner the constitutionally required equal protection of the law by placing Union in a special category, by which Union is denied the territorial protection and growth potential accorded to other public utilities by statute?

2. Is there a reasonable basis for such classification of Union by the Supreme Court of Colorado:

a. On the ground that Union is financed by the federal government?

b. On the ground that Union is a nonprofit, cooperative electrical association?

c. On the ground that the Federal Rural Electrification Act contemplates providing electric service through borrowers only to persons in areas in which other suppliers of electricity do not hold themselves out as willing to extend service; rather than providing new service

to those actually without service which latter interpretation has been the uniform federal administrative interpretation and practice since said Act was passed?

d. On the ground that the private utilities became entitled to complete area rights as against the cooperatives by merely holding themselves out as willing to serve unlimited territory if the expense of extensions were paid by consumers?

3. Can the State of Colorado, through its Supreme Court decree, do any or all of the following matters without violating the 14th Amendment to the Constitution of the United States?

a. Declare in 1960 that an electrical cooperative became a public utility on January 7, 1957, but without the right after said 1957 date to ever serve any new individuals not then served?

b. Classify such cooperative as a special type of public utility, subject to regulation, but without any territorial protection?

c. Declare a qualified public utility status for such cooperative without provision for any such type of certificate in the Colorado statutes, when the regulating Commission granted no such limited certificate, and when no party suggested or requested in the litigation any such certificate?

d. Provide for the gradual decrease to nothing of the business of such cooperative to the detriment of its stockholders and mortgagees, including the United States of America?

e. Declare that Public Service Company (and other public utilities similarly situated, if any) have the exclusive right to sell electricity to the people of Colorado because of a long-standing offer, through an extension policy, to serve anyone who might pay for the extension of lines, regardless of distance and cost, so that no

other public utility can come into existence in Colorado, and especially that no cooperative can change its status to that of a regular public utility with territorial protection under the Colorado statute?

4. Has the Colorado Supreme Court correctly interpreted the Act of Congress (REA Act, Title VII, USC, 901-915) by determining that the words in sections 2 and 4 of that Act "persons in rural areas who are not receiving central station service" mean "persons living in rural areas to whom electrical energy was not available from central stations of public utility companies?"

5. Can the Colorado Supreme Court legally order that a cooperative shall change its by-laws, contracts with its members, and contracts that are a part of the cooperative's agreements with the United States, without illegally impairing the obligations of those contracts?

6. Has the Colorado Supreme Court exercised legislative, executive, fact-finding, and police powers by its decision; and has it placed in force and effect a repealed statute?

STATEMENT OF THE CASE

Preliminary Summary

Union Rural Electric Association, Inc., a small, federally financed cooperative incorporated in 1938, developed its electric system in the then thinly populated area north of Denver. Its customers and members were those unable to afford the cost of bringing the electric lines from the central stations of Public Service Company and Colorado Central Power Company.

As Denver grew and the area increased in population, Public Service Company and Colorado Central (public utilities) found it profitable to extend their lines into this area and constructed parallel and interfering lines. Union sought the protection of the Public Utilities Commission by petition for recognition of utility status and declared itself

ready to serve all customers whether Association members or not. The Public Utilities Commission granted it public utility status on a par with Public Service and Colorado Central from the date of the decision in 1957, with the right to apply for certificates of convenience for extensions of its lines. The District Court, to which an appeal was taken, sustained the Commission on this point. The Supreme Court, however, held that while its obligations, including those to REA, were incompatible with public utility status, nevertheless it would approve such status, but limit Union to serve solely the customers it already had in 1957, without any power to serve the places it was serving if the identity of the customer changed, and without any right of expansion and without any power in the PUC to permit new customers or expansion. This limitation was based on the court's ruling that Public Service and Colorado Central had preempted the entire area by declaring their readiness and willingness to serve.

In the Colorado Session Laws of 1945, Ch. 195, page 535, the law provided that no cooperative electric association could render electric service in territory already served by public utilities "or in territory which can be reasonably served by an existing public utility" and into which it promptly constructs lines for service, "unless a certificate shall be first obtained from the Commission that such service is in the public interest." This law was repealed by the Legislature, Ch. 204, page 565, Session Laws of 1949.

The Supreme Court in effect has reenacted this law with an additional discrimination against Union REA that the Commission shall not have the right to grant even such a certificate.

History of the Litigation

On June 30, 1955, Union applied to the Public Utilities Commission for a certificate of public convenience and neces-

sity authorizing it to exclusively serve "Appendix A Territory," being territory (in general) nearer to the Union lines than to the lines of other public utilities. Appendix A Territory and the distribution lines of the several companies therein are shown on a map in a packet of this Application, such map being a composite based upon several exhibits in the Record.

On January 7, 1957, PUC handed down its decision declaring that Union was a public utility from that date, entitled to territorial protection thereafter and certified to serve its present customers. The application for a certificate for additional Appendix A Territory was denied. The Commission further held that while both the public utilities and Union were permitted to construct new lines not over 300 feet distant from their present lines, yet as to the rest of the territory both Union and the public utilities were required to obtain certificates before building therein.

Public Service Complaint

On January 29, 1957, Public Service filed its complaint in the Denver District Court to review the PUC decision. The complaint alleged that the PUC acted beyond its power in certifying Union to serve territory through which Public Service had theretofore built lines and territory which it claims belonged to Public Service. It further complained that the requirement that Public Service obtain certificates for constructing new lines was erroneous. It asked that the decision be set aside. The District Court, on April 25, 1958, affirmed the PUC decision in full.

The Supreme Court Decision

The Supreme Court modified the decision of the PUC and the District Court in two important respects. It limited Union's right under the certificate of public convenience and necessity so as to permit it to serve only its then members and customers who were living outside of incorporated

towns and outside of areas previously certified to the other public utilities. The members referred to were those who were receiving electricity on January 7, 1957. It reversed the decision of the PUC and the District Court by granting to Public Service and Colorado Central the exclusive right to serve the customers within the Appendix A Territory other than those who were already connected with Union. It held that no certificates were required by those public utilities to serve this territory and the customers other than Union's. It further held that PUC could not grant Union any right to make new extensions or to serve new customers at its places then served except through proof that "adequate service is not readily available" from another public utility.

The Dissenting Opinion

Three of the seven Justices of the Supreme Court dissented, attributing the majority opinion to "lack of sympathy" for Union "from its having evolved from a federally sponsored instrumentality."

The dissent was further based on the following propositions:

1. That the Court was without power to in effect grant an area certificate to Public Service and to permit extensions interfering with the operations of Union without a certificate and merely on the ground that Public Service stood ready to serve.

2. The dissenters further contended that the majority had so modified the certificate granted to Union by the Public Utilities Commission that it was no longer a certificate in the same sense as were the certificates of Public Service and Colorado Central, and that the statutes of Colorado and the basic principles of utility law were violated by the issuance of a certificate which wholly denied to grantee the right of expansion.

The Petition for Rehearing

The petition for rehearing was thereupon duly filed by Union on the ground that the decision of the Supreme Court denied to Union the equal protection of the law by subjecting it to regulation but denying it the rights granted by statute to other public utilities and was a taking of its property without due process of law; that the Court in effect decreed the destruction of Union as an operating concern by denying it the right to take on any new customers and that this constitutes the taking of property without due process of law, in violation of the Constitution; that the Court, in reaching its decision, relied upon an erroneous interpretation of the Federal Statute, the REA Act; and that its decision granting an area franchise to the Public Service and Colorado Central, overriding the territory of Union, was contrary to and without justification under the laws of the State of Colorado, and was an arbitrary taking of Union's property without due process of law.

How Federal Questions Were Raised

The Constitutional questions did not arise in the decisions of the PUC or the District Court, nor under the pleadings in the case. They first arose when the Supreme Court modified and reversed the decisions of the lower Court by injecting into the case the concept of an area certification for Public Service and a special type of certification for Union, decreeing that it could take on no other customers and could obtain no further certifications from the PUC. No such certification was contemplated by any of the parties in the pleadings, nor by the lower Court, nor by the Public Utilities Commission. The Constitutional questions were thereupon immediately raised by petitioner in its petition for a rehearing, which was denied by the Colorado Supreme Court on the 11th day of April, 1960.

REASONS FOR GRANTING THE WRIT

I.

AS BETWEEN THE PARTIES THE DECISION OF THE COLORADO SUPREME COURT IS WITHOUT LEGAL JUSTIFICATION, DISREGARDS THE PUBLIC INTEREST, AND IS ILL-FOUNDED.

Union, as Petitioner herein, contends that the judgment of the Colorado Court of last resort is erroneous. It would limit its characterizing of the decision to the accepted word "erroneous" had not three of the seven judges adopted the more forceful descriptions of the opinion as "without legal justification," as a sweeping declaration "without regard to the public interest," and as "ill-founded" for many reasons. The dissenting opinion constitutes a fairly complete brief on behalf of Union.

The original application of Union to the PUC presented to the PUC simply the question whether or not the PUC should grant to Union certificate of public convenience to exclusively serve certain areas about its existing lines so that future new customers in those areas would be and must be served by Union. This proposal was for the drawing of lines about the respective areas that should be served by the respective public utilities from and by extensions of their existing lines, on the theory that the public should be protected against further construction of unnecessary and overlapping lines.

The PUC denied this application. But the PUC, recognizing the problem presented, decided that it would retain jurisdiction in the general situation presented and would decide each need for new lines upon application, hearing, and the grant of a certificate for the requested new lines, exactly as contemplated by the Colorado statute. It was from this general order that Public Service applied to the District Court for review.

Some grounds set forth in the complaint of Public Service Company disappeared. The question of notice was covered by stipulation for notice in all cases. The question of failure of Union to prove "required generating capacity" to serve future needs really only amounted to a contention that Union should contract in advance for more power from the U. S. Bureau of Reclamation, rather than await awards to it by the PUC of new customers and this subject was not touched upon in presentations to nor in the opinion of the Supreme Court. Similarly, the claim, that the PUC order should have excepted large loads from any possible application for right to serve by Union, was largely ignored.

So the basic claim by Public Service upon which its review was sought was that the PUC had granted to Union a certificate to serve electrical energy in areas where Public Service had established rights through certificates and long establishment of lines, all without any showing to the PUC that the grant of the certificate would serve the public convenience and necessity. The only substantial complaint of Public Service was that there was no proof that justified whatever the PUC had done in the way of granting a certificate.

The specific order of the PUC was: Union is "declared to be a public utility authorized to distribute electricity, non-exclusively, in the uncertified and unincorporated portions" of Appendix A Territory. In the light of the opinion and the injunction against new lines, the most that this order could mean was that Union was to be considered as rightfully serving its existing customers as a public utility and as having the right to apply for new customers under the provisions of the statute. In other words, the PUC either recognized that Union had public utility status as a proven, existing public utility, or decreed upon Union that status.

The Supreme Court approved the "certificate" of public utility status, but then took from that "certificate" all meaning and force by declaring not only that Union could

not apply for further certificates (except in cases where the other utilities do not want to serve) but that Union can never serve a new person not on its books as a customer on January 7, 1957.

The arbitrary character of this decision and its gross unfairness to Union are apparent from any appraisal of the results.

The whole power to *regulate* Union must be based upon its being a public utility with rights to be protected as consideration for regulation and for the exercise of the police power of the state. To declare that the status exists and then to decree that no rights of any sort flow from that status and that Union must gradually cease to do business is most clearly an unconstitutional pronouncement.

II.

ALL OTHER RURAL ELECTRICAL ASSOCIATIONS IN COLORADO ARE ADVERSELY AFFECTED AND THEIR RIGHTS SERIOUSLY LIMITED BY THE DECISION.

The fundamental practical effect of the opinion here sought to be reviewed is that the rural electrical associations over the State (25 in number) can never become public utilities and can never have any protection for their service areas and lines.

The only justification that the Supreme Court has given for "permitting" Union to be considered a public utility is found in the following language from the opinion which first contains a quotation from the PUC decision:

> "'We are *now* issuing Union a certificate; it thus becomes entitled to protection from here *forward*.' (Emphasis supplied.)
>
> "In view of the fact that Union desires a certificate with its attendant protections and obligations, the further fact that from the record, briefs and arguments

presented by Public Service and Colorado Central, it appears that neither objects to, but rather welcomes, the granting of such certificate to render service limited in scope, we find no reason for disturbing this ruling . . . "

Union did not desire a certificate under the terms invented by the Supreme Court. Union considered itself as a full-fledged public utility and sought some enforcement of its statutory rights as such. The PUC recognized its status and promised future consideration of such enforcement.

As to the statement about the position of the other utilities, a quotation from the minority opinion is better than a statement of Union's construction of the record:

"It would seem that its [the majority of the court] only reason for affirming the granting of a Certificate to Union is that there is no particular objection to this on the part of the other utilities so long as Union is restrained. I find no basis in the briefs for the observation (in the majority opinion) that neither Public Service nor Central objects to the issuance of a Certificate 'to render service limited in scope'. Public Service has taken strong exception to the recognition of Union as a utility for any purpose. It has proceeded, and I think correctly, on the premise that it is impossible to recognize Union as a utility (as the majority has) and at the same time (for practical purposes) not recognize it as a utility."

This means that any other REA in Colorado can become a public utility only by stating that it desires to have its status as a public utility recognized with the understanding and limitation that it can never serve any other person not numbered among its customers at the time the PUC grants it recognition. Further, it would appear that Public Service must also consent. There is no limitation suggested in the opinion upon the application of service by Public Service to all parts of the State.

III.

THE DECISION THREATENS ALL RURAL ELECTRIC ASSOCIATIONS IN THE UNITED STATES.

The basic theory of the Colorado Supreme Court is that a public utility that has built lines, and which has offered to serve anyone who will pay the cost of new lines to that person's location, has thereby occupied the field of service to the public and must be treated as the only company entitled to have any sort of territorial protection.

It is to be assumed that this theory will now be urged by the private companies in other States and the Colorado decision utilized as a precedent.

It is not practical to consider all of the problems thus created. Perhaps in some States the situation has been treated by more specific legislation than in Colorado, but this opinion might even then be used as an attack upon the constitutionality of any such statute. All Commissions charged with the regulation of public utilities and in any way concerned with fitting the REAs into a proper place in the local economy will have to give some consideration to the remarkable theories developed by the Colorado Court. The whole thought of "regulation" is indefinitely expanded by the decision.

Therefore it is urged upon this Court that a matter of great and general importance is here involved.

IV.

THE FACT THAT A UNITED STATES STATUTE HAS BEEN INTERPRETED TO MEAN SOMETHING DIFFERENT FROM ITS STATED TERMS IS AN ADDED REASON FOR THE DECISION BEING CONSIDERED OF GREAT PUBLIC IMPORTANCE.

The Rural Electrification Act authorizes loans to allow the building of lines to persons not actually receiving power

from some central source. The opinion of the Colorado Supreme Court at least suggests that the statute limits loans to people who cannot obtain electrical energy from an existing private company, by paying the cost of building lines; and then in effect says that there are no such people, at least in Colorado. This is an important and far-reaching contention, if further urged.

Basically, the Colorado Supreme Court disregards the interests of the United States and the purposes of the REA Act, and conflicts with the decisions of the Missouri and Texas courts. (149 SW2d 881 and 289 SW2d 819).

V.

IN THE LIGHT OF LONG CONTINUED PUBLIC ADVERTISING BY THE PRIVATE COMPANIES THIS DECISION ASSUMES GREAT IMPORTANCE.

It is public knowledge that the private power companies have been conducting an advertising campaign to prejudice people generally against such legislation as the Rural Electrification Act and the many legislative actions that are the basis for public power supplies.

The decision obtained from the Colorado court is a most important step and bulwark in that campaign. The probable effect upon people generally of this opinion will be great and will most improperly influence the future consideration of such existing and of similar future laws or proposals.

VI.

THE UNITED STATES IS THE BANKER FOR THE RURAL ELECTRIC ASSOCIATIONS AND THE SECURITY OF ITS LOANS IS DEFINITELY THREATENED BY THIS DECISION.

Union, and all of the similar cooperatives over the nation, must operate entirely upon borrowed money (with rather trifling exceptions). The original loans were entirely from

the United States. Gradually those loans were reduced through loans from members of the REAs. The latest report shows over $2,500,000,000 due the United States from over one thousand REA borrowers.

It is easy to see that the Colorado court has decreed that Union must disappear from the scene in time. This necessarily means a loss to its creditors. The same situation can spread to many other or to all other states, if the theories of the Colorado court are adopted as valid law.

This situation adds to the great importance of this application.

VII.

IT APPEARS THAT THIS DECISION HAS BEEN IMPROPERLY INFLUENCED BY POLITICAL OR ECONOMIC THEORIES OF THE MAJORITY MEMBERS OF THE COURT.

The statement that political or economic theories of members of a Supreme Court of a State have improperly influenced a decision cannot ordinarily be made, for the parties are unaware of the discussions within the court and may be reluctant to so construe an opinion. But here three members of the court have subscribed to the following language, which alone is a good and sufficient reason for this court to regard this case as of the greatest public importance:

> In view of the proceedings before the PUC, "this Court should not set aside well founded findings and well premised conclusions upon the simple basis of lack of sympathy for the cooperative arising from it's having evolved as a federally sponsored instrumentality. Such an attitude is apparent in the majority opinion."

MORRISON SHAFROTH
Attorney for Petitioner
730 Equitable Building
Denver 2, Colorado

May, 1960.

APPENDIX

OPINION AND ORDER OF PUC

FINDINGS AND JUDGMENT OF DENVER DISTRICT COURT

OPINION OF COLORADO SUPREME COURT

DISSENTING OPINION OF THREE JUSTICES

ORDER AND JUDGMENT OF SUPREME COURT

PETITION FOR REHEARING ON BEHALF OF UNION

ORDER DENYING REHEARING

MAP, IN ENVELOPE, BACK COVER

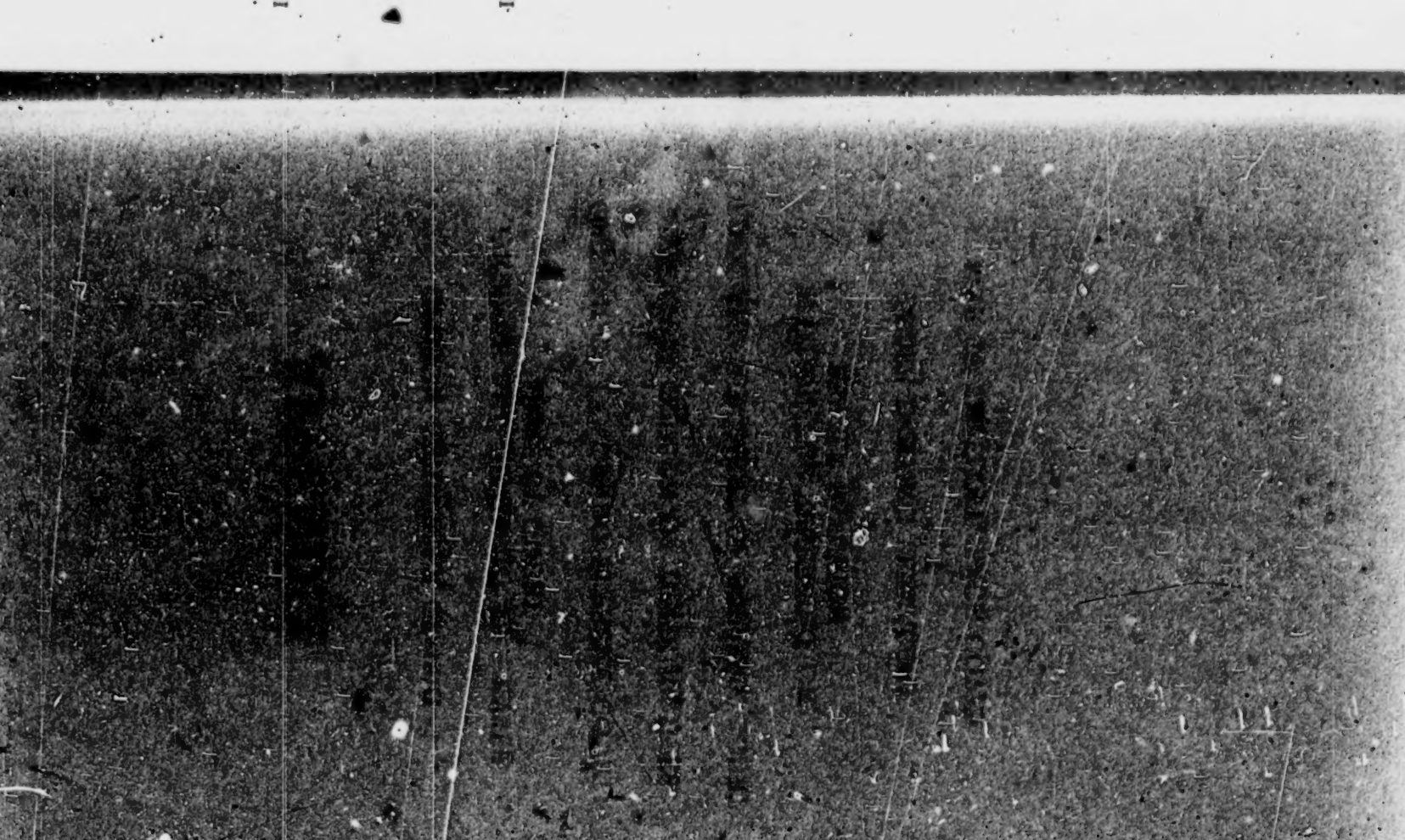

EXHIBIT A

PUC Decision
(Decision No. 47074)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

APPLICATION NO. 13576

IN THE MATTER OF THE APPLICATION OF UNION RURAL ELECTRIC ASSOCIATION, INC., BRIGHTON, COLORADO, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO SERVE AN AREA AROUND BRIGHTON, COLORADO, WITH ELECTRICAL ENERGY, AND FOR CLARIFICATION AND RATIFICATION OF ITS EXISTING RIGHTS TO SERVE SUCH AREA, AND FOR EXTENSION OF SERVICE IN SUCH AREA; AND IN THE MATTER OF THE COMPLAINT OF UNION RURAL ELECTRIC ASSOCIATION, INC., AGAINST PUBLIC SERVICE COMPANY OF COLORADO.

CASE NO. 5108

IN THE MATTER OF THE APPLICATION OF UNION RURAL ELECTRIC ASSOCIATION, INC., BRIGHTON, COLORADO, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO SERVE AN AREA AROUND BRIGHTON, COLORADO, WITH ELECTRICAL ENERGY, AND FOR CLARIFICATION AND RATIFICATION OF ITS EXISTING RIGHTS TO SERVE SUCH AREA, AND FOR EXTENSION OF SERVICE IN SUCH AREA; AND IN THE MATTER OF THE COMPLAINT OF UNION RURAL ELECTRIC ASSOCIATION, INC., AGAINST PUBLIC SERVICE COMPANY OF COLORADO.

January 7, 1957

Appearances: MORRISON SHAFROTH, Esq., Denver, Colorado,
JOHN F. SHAFROTH, Esq., Denver, Colorado, and
ERL H. ELLIS, Esq., Denver, Colorado, for Union Rural Electric Association, Inc.;
CHARLES J. KELLY, Esq., Denver, Colorado,
BRYAN O'DONNELL, Esq., Denver, Colorado, and
RALPH SARGENT, JR., Esq., Denver, Colorado, of Lee, Bryans, Kelly, and Stanafield, Esqs., Denver, Colorado, for Public Service Company of Colorado;
PHILLIP A. ROUSE, Esq., Denver, Colorado, and
WORTH ALLEN, Esq., Denver, Colorado, of Allen, Lynch and Rouse, Esqs., for Colorado Central Power Company;
JOHN R. CLAYTON, Esq., Greeley, Colorado, of Kelly and Clayton, Esqs., for Home Light and Power Company;
HENRY ZARLENGO, Esq., Denver, Colorado, and
A. L. MUELLER, Esq., Denver, Colorado, for The Public Utilities Commission of the State of Colorado.

STATEMENT

By the Commission:

On June 30, 1955 Union Rural Electric Association, Inc., (hereinafter referred to as "Union") filed with the Commission an application for a certificate of public convenience and necessity, authorizing it to serve an area around Brighton, Colorado, (hereinafter more particularly described) with electrical energy, and for clarification and ratification of its existing rights to serve such area, and for extension of service in such area; joined with a complaint of Union against Public Service Company of Colorado (hereinafter referred to as "Public Service"), based *inter alia* upon alleged encroachments of Public Service in territory considered by Union as a part of its service area.

For convenient reference, the Commission designated that part of the document referring to Union's application for certificate of public convenience and necessity as "Application No. 13576" and that part referring to complaints, as "Case No. 5108."

Answer to the complaints in Case No. 5108 was filed by Public Service, and protest to favorable action on Application No. 13576 was filed by Public Service Company and by Colorado Central Power Company (hereinafter referred to as "Colorado Central").

It was agreed that the application and the case should be heard upon a consolidated record, and a tentative time schedule for hearings was also agreed upon. Hearings commenced in September, 1955, continuing at intervals over the period of a year, final hearing being concluded on September 5, 1956. Exhaustive briefs were filed by all interested parties, and have been carefully considered by the Commission, and both the application and the case have been finally submitted for decision.

Throughout the proceedings, all Rural Electric Cooperatives in the state, as well as all regulated electric utilities

and the Boards of County Commissioners, cities, towns, and Chambers of Commerce in the area affected, were kept advised as to all hearings, giving all interested parties an opportunity to be heard.

The Commission has carefully re-examined the evidence, exhibits, arguments, briefs, and all authorities cited, together with the Commission's records, and has reached its conclusions upon the over-all picture of the issues as thus developed. We shall not attempt to review the testimony of each witness specifically and in detail, which would unduly lengthen this decision, but we have attempted to give every such detail its proper evidentiary weight.

The historical background of the controversy is important to a proper determination of the issues. The Rural Electrification Administration was created by Congress under the provisions of the "Rural Electrification Act of 1936" effective May 20, 1936. The act provided for the making of loans for rural electrification and for the furnishing of electrical energy to persons in rural areas who were not receiving central station service. The act defined "rural area" as any area not included within the boundaries of a town having a population of 1500 inhabitants, and as including both farm and non-farm populations therein.

Such a "rural area" existed in 1937, generally to the north of Denver, and including, among other areas, the present suburban area in Denver's northeast quadrant. This area, which Union claimed is a "rural area" in contemplation of the act, is described in "Appendix A" attached to this decision, to which reference is made for further detail. It is this area that Union wishes to obtain for itself as an exclusive service territory in which to conduct operations as a public utility. The area is bounded by various areas served respectively by Public Service, Colorado Central, Home Power and Light Company of Greeley, Colorado, and Intermountain REA. There is no controversy here involved between any of these parties except

that between Union and Public Service as to the complaints in Case No. 5108, and between Union, on the one hand, and Public Service and/or Colorado Central on the other hand, relative to the relief asked by Union in Application No. 13576.

Union was incorporated as a Colorado corporation on October 21, 1938, its stated objects and purposes being to generate or purchase electrical energy for its members only under a cooperative form of membership, and to transmit and sell that energy to its members only. With its preliminary application for REA membership and loan, a survey was submitted of a general area of unelectrified farms and establishments, accompanied by a map showing approximately 1,000 farms, summer homes, and other points, mostly in Adams and Weld Counties, with a few in Boulder and Jefferson Counties, the owners of which had indicated an interest in securing electrical service and had signed a preliminary application for the same. It was stated that wholesale power could be purchased from Public Service or from Colorado Central, or that the project might build its own Diesel plant, and also that there was a possibility of obtaining power later from the government systems then in the planning stage. The original REA loan for $1,500,000, together with all subsequent loans, has been represented by promissory notes secured by mortgage. It is significant that these mortgages contain restrictions providing that Union is bound to do all its financing with the United States, to pay only reasonable salaries, to hire as its manager only a person approved by the REA Administrator, and to pay no dividends except from surplus earnings, after full provision for debt amortization had been made. Under the provisions of the By-Laws adopted by Union, members were required to pay a membership fee of $5.00, one share of stock to issue to each member.

The first advance to Union under the original mortgage was $320,000, to be used for the construction of distribution

lines in the area referred to. By June 10, 1938, Union had planned and mapped its proposed distribution lines covering most of the area described in Appendix A, showing a total of about 280 miles of lines capable of serving about 800 members. Such lines were built in the summer and fall of 1939, and all energized and utilized by the end of 1940.

At the time of the incorporation of Union, Public Service and Colorado Central were both in existence, actually rendering service in at least a portion of the disputed area.

Public Service Company is a regulated operating public utility. It generates its own electricity at several hydro and steam plants, and sells at wholesale and retail, and at all levels of use, industrial, commercial, and residential, in many areas of the State. It also distributes natural gas, provides a limited steam heating service in Denver, and operates a transit system in Boulder.

It is the corporate successor of smaller companies which formerly operated in various centers of population. Characteristically, service started in one locality, extending radially until it encountered service radiating from some other center; the services were then merged. By 1926, the various companies had all been consolidated into the present Public Service Company.

Electric service in Denver and its suburbs to the east and west developed early, the north suburban area remaining basically agricultural until after World War II; population there was concentrated close to the City Limits, even in 1938; rapid residential and industrial development in this area commenced in about 1948; since then this area has become urbanized, with several substantial housing developments and a considerable industrial component.

In the area affected by the application, the Company operates one hydro plant and three steam plants; total generating capacity of these plants in September, 1955, was 515,000 kilowatts; an additional steam plant of 100,000 kw initial capacity is now under construction in the area.

The company's system reserve, to forestall shortages in case of outage at times of peak demand, is 100,000 kw. A 115,000-volt three-phase transmission belt, two and four ply in some areas, has been constructed around Denver close to its borders, to provide effective large load service at any location close to Denver; a 230,000-volt outer transmission belt is in the formative stage. It is possible now for the company to give industrial service at any location in the Denver area from at least two separate generating plants, thus minimizing the danger of plant shutdown if one source should fail for any reason.

The location of the Company's transmission and primary distribution lines existing in the area in question on September 1, 1955 (two months after the present application was filed) are illustrated by Exhibit 11. It will be noted from this exhibit that the Company has a heavy concentration of lines in some areas, and none at all in others, predominantly rural.

The Company, although regulated by this Commission for many years, has obtained certificates only in limited areas, of the total area now under consideration. In addition to certificates it holds to exercise franchise rights in several outlying communities, it is certificated to serve areas contiguous to certain of its transmission lines, and has succeeded to a certificate to serve an area surrounding Arvada, a northwest Denver suburb. Other regulated services it performs rest not upon authorization from this Commission, but upon statutory authority. The Company has no general certificate of convenience and necessity to operate, and does not ask in this proceeding to have any area certificated to it: it did seek such a certificate in 1948 in a matter since heard and taken under advisement, but it now seeks to withdraw that application.

Colorado Central is also a regulated operating electric public utility company. It obtains its entire supply of electricity from Public Service Company, and distributes it

at all levels of use in Denver's suburban southwest quadrant (not here in dispute), in the vicinity of Golden, and since 1927, in an irregular area along the Platte River Valley from the vicinity of Brighton north to the vicinity of Greeley. The part of the disputed area in which Colorado Central operates is illustrated by Exhibit 101. No map of record illustrates panoramically the location of Colorado Central lines in the disputed area; they are shown in disjointed detail, however, on Exhibit V (Maps 9, 21-23, 33-35, 45-48, and 77), and Exhibit NN. Colorado Central has exclusive service certificates only in limited areas. In addition to certificates authorizing it to exercise franchise rights in several outlying communities, the Company has heretofore obtained exclusive service authority in six townships in the Keenesburg area, and in another area not involved in this proceeding. Other services it performs rest not upon authorization from this Commission, but upon statutory authority. The Company did, in 1945, apply to have a determination made that it was "lawfully serving" an area described, but did not seek to have that territory certificated to it. No disposition has yet been made of the application.

On May 13, 1939, Public Service and Union agreed, in writing, upon sale and purchase of electrical energy to be delivered by Public Service at Union's substation near Eastlake, Colorado, from a line running from Denver to Lafayette, with a circuit at said substation. This contract was in force and effect until December 23, 1940. It provided that the energy thus sold was "for resale and distribution solely to its (Union's) members for their individual use," and, further:

> "Consumer (Union) hereby agrees that during the term of this agreement, none of the electrical energy purchased hereunder shall be sold or delivered to any customer or prospective customer of company (Public Service), located on that portion of any road or right of way upon which there is an electric distribu-

> tion line of company. Company agrees that during the term of this agreement it shall not sell or deliver electrical energy to any customer or prospective customer of consumer located on that portion of any road or right of way upon which there is an electric distribution line of consumer."

Union alleges that prior to the execution of the above contract, it furnished Public Service with a map showing the location of the lines of Union to be served through such purchase of wholesale power, but no such map is in evidence.

On January 18, 1941, said parties entered into a new contract for the sale and purchase of wholesale power, the electric energy to be delivered at a new substation near Brighton from a primary line of Public Service, running from Denver to Fort Lupton. This contract was effective as of December 23, 1940, and continued in force and effect, and Public Service furnished energy thereunder to Union, until January 1, 1951, at which time Union commenced to obtain all of its power from the United States Bureau of Reclamation, as it has since continued to do. This 1941 contract required Public Service to furnish energy to Union, "to supply that portion of consumer's project which is known as 'Brighton Division.'" Union maintained that all areas then served by it were embraced within this designation. The contract also provided:

> "Neither party, unless ordered so to do by a properly constituted state regulatory authority, shall duplicate the other's facilities except insofar as such duplication shall be necessary in order to transmit electric energy between unconnected points on its lines . . . or distribute or furnish electric energy to anyone who, at the time of the proposed service is receiving electric service from the other, or whose premises are capable of being served electric energy by the existing facilities

of the other without extension of its distribution system, other than by construction of lines not to exceed 300 feet in length."

During the term of this contract, Union purchased all of its electrical energy from Public Service except that in certain summer months, with the approval of Public Service, it supplemented its power needs when summer pumping increased the demand, by purchases from the U. S. Bureau of Reclamation.

New lines were added by Union to its distribution system at various times, and many extensions were made all over the system to serve additional members. In 1945, Union built into an area northeast of Fitzsimons Hospital, to serve additional members. While this construction was in progress, to-wit: on March 14, 1945, Section 36 (k) of the Public Utilities Act became effective, reading as follows:

"Section 36 (k). No cooperative electric association or non-profit corporation or association shall render electric service in territory already served by electric public utilities, whether the latter be municipally or privately owned, or in a territory which can reasonably be served by an existing public utility and in which territory such public utility does actually construct lines and agree to serve consumers promptly and within a reasonable time, unless a certificate shall first be obtained from the Commission that such service is in the public interest; provided, however, that nothing herein shall require discontinuance of service to consumers to whom service has been rendered heretofore."

Union made no application to the Commission under the provisions of this law, but on March 23, 1945, Colorado Central filed Application No. 6918 for an order defining the territory it was lawfully serving in certain areas in which Union was also serving customers. This application was evidently founded upon Section 36 (k) *supra*. Union answered, denying that Colorado Central was serving the

area in question and alleging adequate service by Union therein. No final disposition of that application has been made as the parties reached a tentative agreement in that year as to their respective service areas.

In May and June, 1945, the officers of Union and Public Service held several meetings in an effort to arrive at some operating agreements relative to a division between them of the territory then served by one or the other, or both, so that each might be secure from the competition of the other in the future. The parties were unable to agree.

In 1948, similar discussions were held by the officers of Union and Colorado Central, but no definite agreement as to division of service area was reached.

In 1947-1948, Union started the construction of a line, separate and unconnected with its Brighton District, from south of Estes Park to Ward, via Peaceful Valley. This line would have been served with power from the United States Bureau of Reclamation. The city of Estes Park filed action in the District Court to enjoin Union from this activity, claiming that this construction was a violation of Section 36 (k), *supra*. The case was settled by stipulation under which part of Union's line was purchased by the City of Estes Park, part by Public Service, and part was removed by Union.

In August, 1948, Public Service initiated two separate proceedings before the Commission. In Application No. 9450, it asked for an order requiring Union to cease serving one or two irrigation pumps upon a farm already served by Public Service in the area which Union conceded was in territory belonging to Public Service under an alleged oral agreement of June, 1945. Section 36 (k) above referred to was repealed in the spring of 1949, and on January 12, 1951, the Commission dismissed this Application No. 9450 on the ground that the repeal of said section rendered the questions involved moot.

Application No. 9451 related to certain areas just north of Denver, a part of which were served by Public Service and a part of which were served by Union, and Public Service asked the Commission to determine what rights it had in these areas and to issue a certificate of public convenience and necessity to Public Service as to the areas determined to be its territory. As to the areas included in the application and served by Union, Public Service claimed a certificate based on "Grandfather Rights." Some testimony was received and briefs were filed and the application submitted to the Commission for determination. On March 23, 1955, Union filed its motion to be permitted to file further appearance in the matter, requesting that the Commission determine whether Union was a public utility, and if so, the certification, to it of an area of service. Public Service then asked leave to withdraw the application, and no decision on these motions has been rendered by the Commission.

In February, 1950, Public Service submitted to Union a written agreement with map attached, executed by Public Service for a specific division of the territory around Irondale. Union refused to sign, contending that the areas allocated thereby to Union were less than the areas shown as Union territory in the 1945 maps and negotiations.

In the period from 1948 to date, there were several cases of minor importance on or near the boundary line between the areas served by Union and Public Service, where there have been short lines built by one company or the other into the area served by the other.

From 1941 to 1945, expansion was restricted by World War II material shortages. In 1944, the Rural Electrification Act was modified in important respects: The agency was given permanent status; the maximum loan term was extended; and the interest rate was pegged at a level below the rate then current. The agency immediately began to stress "area coverage" to the cooperatives nation-wide,

urging them to submit loan applications on that basis, without regard to feasibility, leaving the question of feasibility to the agency to decide; it also urged cooperatives to back-order equipment, so as to be first in line when supplies again became available. During this period, and until 1950, cooperatives the country over were trying to expand to the full limit of their economically feasible territory; it was "pretty much standard policy" until perhaps 1951 for them to take the position that state regulatory agencies had no jurisdiction over them. About this time the policy changed, and the cooperatives began to seek the protection of certification. As an REA official testified:

> "With the backbone of the system built, areas are rather clearly defined now. From our viewpoint it makes much better sense at this point to say this is our service territory, this is the area we expect to serve, and settle it on that basis; that is rather than to have any lack of understanding about what is the service area of the system. That change occurred I would say as the systems began to reach saturation of the area, the service area with backbone lines."

Union's manager, then and now, has fortified this view: "The Union REA is prepared to serve any loads that may come in the area where we are now serving as long as the person becomes a member and meets the requirements of our cooperative * * *."

Meantime, in 1948, the area in dispute near Denver began to undergo rapid development. Several industries with initial loads exceeding 1,000 kilowatts have come into the area. Several hundred loads of 100 to 500 kw each, totaling about 10,500 kw demand, have been connected, and numerous small loads have become large ones. New residential load has also occurred; the number of Public Service Company customers in the area has grown from 5,500 in 1937, 8,500 in 1948, to 26,000 in 1955. Union's connections have grown from none in 1939 to about 3,000 in 1955.

From January, 1951, to March, 1956, Union's monthly firm (winter) load grew only about 1,400 kilowatts. Nevertheless, in 1953, it began an active program of heavying up its transmission facilities throughout its plains area, completing it while the present matter was being heard.

From the sum of the evidence, we conclude that in about 1953, Union decided to tie down for itself a portion of this area of growth; to do it as an unregulated cooperative, if possible, but if not, to do it as a public utility.

In 1954, Union commenced suit against Public Service Company in District Court at Brighton, to enforce, by injunction, an agreement said to have been made in 1945, and said to divide the disputed territory between the two. Had it been successful, this would have secured exclusive territory for Union, but left it unregulated. The Court, on February 14, 1955, dismissed the action on the pleadings, on the ground that even if such an agreement had been made, it would not be enforceable, and also on the ground that this Commission, and not the Court, has preliminary jurisdiction in the matter. So far as we are informed, this decision was not appealed.

On May 28, 1955, the members of Union at annual meeting voted to change their certificate of incorporation to remove provisions limiting service to members only, and to provide for service to the public; the amendment was filed with the Secretary of State on June 6, 1955. A by-law carrying this change forward was adopted at the same meeting.

It appears to us that resolution of the matters involved both in Case No. 5108 and Application No. 13576 depends upon the answers to four principal questions:

(1) Does the Commission have jurisdiction in the matter?

(2) Should Union be declared to be a public utility?

(3) If so, what date? and

(4) If so, what, if any, should it be assigned as an exclusive service territory?

Regarding the Jurisdiction of the Commission

We are mindful of the fact that this Commission is not a Court; it has no power to render judicial decisions, nor any jurisdiction over remedial rights. At this point in the decision, however, the question is not one of judicial jurisdiction, but only of our practical, non-judicial authority to hear the evidence and ascertain the facts upon which the operation of law depends. All of the persons who will be affected by our decision are before us. We turn to our authority over the subject-matter.

Union has filed application for a certificate to operate as a public utility. Our statutes provide:

> "The Commission shall have the power to issue said certificate after hearing, as prayed for, or to refuse to issue the same, . . . and may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require." ('53 C.R.S. 115-5-3).

Union joined with its application a complaint that Public Service Company, a public utility company, has unlawfully extended its lines into territory then being served by a public utility, and improperly used its natural gas service to obtain customers for its electric service. Relative to complaints, our statutes, in addition to '53 C.R.S. 115-5-1, provide:

> "Complaints may be made by . . . any corporation . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission . . . The Commission shall fix the time and place where any hearing will be had upon any . . . complaint . . ." ('53 C.R.S. 115-6-8).
>
> "At the time fixed for any hearing before the Commission . . . the complainant . . . or corporation com-

> plained of . . . shall be entitled to be heard, examine and cross-examine witnesses, and introduce evidence . . . After the conclusion of any hearing . . . the Commission shall make and file its order containing its decision." ('53 C.R.S. 115-6-9.) And compare P.U.C. et al vs. City of Loveland, 87 Colo. 556, 563, 289 Pac. 1090 (1930).

We conclude that we have authority sufficient to allow us to hear the evidence upon the application and complaint, and to enter our decision.

Regarding Certification of a Cooperative to Operate as a Public Utility

No Colorado statute or Supreme Court decision concerning this question has come to our attention. It appears to us that any person, firm, or corporation can become a certificated public utility, if it meets certain qualifications. These are: qualification to serve, legal, financial, moral and physical; willingness to serve indiscriminately, and to the extent of its capacity all members of the public who may demand its service, and are willing to comply with its reasonable regulations; and that the proposal is economically feasible. Certain documentary evidence may also be required concerning franchises and other matters, in some instances ('53 C.R.S. 115-5-1-3).

Union meets all of these formal requirements. Its Certificate of Incorporation has been amended to authorize service to the general public. It is not barred from becoming a public utility by any law. Sixteen other cooperatives now hold certificates from the Commission, through the acquisition of certificates heretofore issued to private utilities. It is in sound financial condition. The utilities may not take kindly to some of the cooperative's raiding tactics; the cooperative also complains of some of the practices of the utilities. In all the particular facts and circumstances of the case, however, we are not able to say that the applicant has strayed so far from the right as to be morally dis-

qualified to become a public utility. The physical plant of the applicant is clearly sufficient to the needs of present customers; it has actually been operating these sixteen years. By changing its Certificate of Incorporation and making public application for utility status, it demonstrates willingness to serve the public who may demand its service, to the extent of its capacity.

There is question whether the holding out here is to serve the public "indiscriminately," in view of the by-law provision: "non-member consumers shall have no right of any sort in the Corporation beyond the contract for service, and shall have no interest in the profits or assets of the corporation." This is construed by the cooperative's management to mean that non-members shall not be entitled, as members may some day be, to share in cash profits according to use. This distinction is said to be a discrimination going to the very holding-out, and to constitute such a limitation upon dedication of the facilities to public use as legally to bar the cooperative from becoming a utility. We hold a contrary view.

Although net profits of Union in recent years have been in the range of 18% of total revenues, no cash distribution of profits to the general membership is authorized under present by-laws and loan contracts until such time as the total of accumulated retained profits equals 40% of the cooperative's total assets, and debt is at least 40% liquidated; such distributions thereafter are to be only as to the excess over 40%. As nearly as can be foretold at present, it will, at best, be many years before a cash distribution will be possible. Until that time, non-members and members will receive the same treatment: no cash distribution. At any time when different treatment of members and non-members in fact will result, the Commission, if the cooperative becomes a public utility, has ample power to correct injustice, if any should occur:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices . . . of any public utility . . . are unjust, unreasonable . . . the Commission shall determine the just, reasonable, proper . . . rules, regulations . . . and shall fix the same by its order, rule or regulation." ('53 C.R.S. 115-4-1.)

We do not believe that the mere possibility of some future difference of treatment as to cash distribution of profits, in our power to prevent, is sufficient ground for denying Union utility status.

Turning, then, to the existence of prospective customers not presently served by a public utility. Union is serving over 3,000 connections, none of whom presently has the benefits of regulation; they have no outside authority to whom they can turn for assistance, if dissatisfied with their rates, service, or facilities. If the cooperative attains utility status, then all of its customers, members and non-members alike, will be entitled to assistance, if in need of it. It is to the advantage of these people to have their supplier regulated, and to have available a service which cannot be withdrawn without prior approval of impartial outside authority. In short, we believe that the public convenience and necessity for regulation and thus for the issuance of utility authority, is shown by the circumstances of existing service.

Union has furnished evidence of its corporate authority, as required by statute, but has not furnished evidence that it "has received the required consent, franchise, permit, ordinance, vote, or other authority of the proper . . . municipal or other public authority" in any city or town ('53 C.R.S. 115-5-5). It therefore cannot be certificated to serve in any town, in this proceeding. Its application, as amended, asks no authority to serve any city or town, however, and an order consonant with this omission from the application can therefore be issued, so far as the formal requirements for a certificate are concerned. Further, it appears that

towns in the area all have service now; to authorize the cooperative to serve in towns would thus require removal or duplication of facilities which already exist. No showing has been made that the public convenience, necessity, or other circumstance requires that this be done. So much for the formal requirements.

We believe that other circumstances here warrant our assuming affirmative authority over the cooperative, as an incident of granting it public utility status.

There was considerable evidence that the parties have engaged in construction races, overbuilding, duplication of lines, and intermingling of services. All agreed that these conditions were undesirable and contrary to the general public good. The so-called anti-duplication law, requiring that a certificate be obtained before facilities are constructed ('53 C.R.S. 115-5-1) supports them.

The present proceeding concerns only distributors of electric energy. This Commission does not have authority over such a distributor unless it is a public utility. The public interest in eliminating wasteful duplication of electric facilities in the disputed area, and in assuring orderly and economical future development of the area, possible only if one acquires authority over the cooperative, is, in our opinion, further justification for granting recognition to the cooperative as a public utility.

We conclude that authority exists for granting Union public utility status, and that it should be granted. The question of territorial authority and the time as of which the cooperative becomes entitled to protection of its facilities are separately discussed.

Regarding the Effective Date of the Cooperative's Utility Status

The parties differ as to the event which, occurring, endows a company with utility status. The cooperative would have the event as early as possible, the utility as late as possible.

The theories which the parties have advanced concerning the creation of utilities—whether by conduct, regulatory recognition, or however—overlook the true significance of utility status to the utility, and to the public, in such matters as this one: protection of facilities. The significance of the date utility status is attained, to these parties, is that as of that date, and no sooner, the utility becomes entitled, by law, to have its facilities protected against invasion. The problem is more easily understood if less attention is paid to theories concerning a utility's birth, and more to considerations warranting protection of its facilities as a utility. The justification for protecting facilities is the public interest in the service obtained from those facilities; they are protected only because the public interest requires that they be protected. The public has no interest in protecting them until they become devoted to the service of the public. The problem is to find when the public acquires such an interest in facilities as to warrant protecting them; fine-spun theories of construction of statutes may help in answering the problem, but do not control the answer.

Union argues that in deciding when its facilities became so devoted to public benefit as to warrant protection, notwithstanding that its charter prohibited it from serving the public, we should not limit our consideration to the charter, but should consider all the facts of its operation. To buttress its "factual test," it cites many authorities, including two Colorado Supreme Court decisions, which say, on this point, that the substance of the operation, and not the form of the charter, is controlling. In this case, however, the form and the substance are alike: Union did not at any time, at least before October 17, 1955, at the earliest, ever hold itself out publicly as being willing to serve the public, as distinguished from its members. Its claim that it served the public is not borne out by the evidence. Instances of its attitude and actual practice prior to 1955 are above referred to. In addition, its manager in this proceeding re-affirmed its practice. When Union changed its rate structure in 1950,

it did not file its rates with the Commission "as we were serving members only at that time." Referred to the period before it changed its charter to permit service to the public, he testified:

> "Q. Then you didn't hold yourself out to serve the public indiscriminately, did you?
>
> "A. We held ourselves out to serve anyone who wanted service and who would become a member.
>
> "Q. That was a condition, that they become a member?
>
> "A. That is correct.
>
> "Q. Did you serve any non-members at all at any time?
>
> "A. None at all."

Counsel for Union says the same, but in a different way:

> "Union has actively solicited all possible business in its area from the start and has made 'membership' a most simple and *almost* automatic procedure." (Emphasis supplied.)

The cooperative does not say that it held itself out as willing to serve the non-member public. Its claim rests entirely upon the assertion that it never refused membership to anyone, although it concedes it could have. It will thus be seen that on a single set of facts, this cooperative, in 1948, claimed it was not a public utility, and now claims that it is. This does not relieve us of the burden of determining the truth of the matter; it does leave the cooperative in a rather poor position to deny that we are right. Our view is the same as that of our Supreme Court in the recent case of *Parrish et al. v. P.U.C.*:

> "The service to each customer is a permissive service, which creates the distinction between a public utility or a private carrier. The record discloses no dedication of the pipe line by Cobb to the public service, and, as was determined in the City of Englewood vs. City

> and County of Denver, supra, this can never be presumed, but must be supported by evidence of an unequivocal intention to make such a dedication . . . We have no testimony to the effect that Cobb ever made any semblance of an offer to serve the public. The fact that he testified that he never refused a tap to anyone does not change his status."

Nor do we believe that the act of changing the charter changed Union's status. This was a private act, taken within the corporation. At most, it only authorized the corporation to serve the public; it did not require such service. It did not amount to a dedication of its property to the service of the public. In *Colorado Utilities Corporation v. P.U.C., et al.*, it was sought to compel a coal company which sold, on a dump basis only, any excess power it generated, to serve as a public utility. Our Supreme Court, in finding that the Respondent could not be compelled to serve as a public utility, said:

> "Moffat Coal Company, under its amended charter, had the power to generate and sell electrical energy, but by such charter it did not have express power to do so as a public utility. However, had its charter contained such express provision, it would not necessarily follow that it is a public utility bringing it within the statutory definition of that term, unless it so acted;"

In the present case, authority to serve the public prior to the 1955 amendment of its charter, could not even be implied; it was expressly prohibited. There is no evidence that Union took any action between the date its charter was amended and the date the application was filed, to indicate publicly a willingness to serve the public. Even the carefully worded application, filed June 30, 1955, says only that the cooperative "can now render service to a customer who does not desire to become a member;" nowhere does it say that the cooperative is willing to serve such a customer.

It was not serving any on October 17, 1955; the first evidence of serving such a customer was as of February 16, 1956. There being no evidence of a declaration or other public holding out to serve, we must rely on the fact of serving as evidence of the intention. We conclude that the first occasion upon which the cooperative held itself out to the public as being willing to serve the public occurred sometime between October 17, 1955 and February 16, 1956. This holding out, of course, goes simply to show one of the requirements for utility status: intention and willingness to serve. This qualification, standing alone, is not sufficient to endow a company with the protection of statute, as is noted below.

It is argued elsewhere that the cooperative cannot become a utility, as illegal operations do not justify the granting of a certificate. Our conclusion is that the cooperative did not operate illegally as a utility; it did not operate as a utility at all, until recent date.

Regarding the Complaint
(Case No. 5108)

Union complains only of events which occurred prior to the date the complaint was filed, June 30, 1955. As the cooperative did not perform any public utility service, and did not attain public utility status prior to that date, we conclude that the cooperative has no standing to complain.

Union also complains that Public Service used its natural gas service and gas construction deposits as a lever to obtain customers for its electric department. It does not appear that anyone seeking such service ever complained to us, formally or otherwise, concerning the treatment they received; even at the hearing, no affected complaining witness, except Union's manager, appeared. It is not alleged nor shown that if this occurred, it was (in the words of the statute, '53 C.R.S. 115-6-8), in violation of any provision of law or of any order or rule of the Commission; nor does

the weight of evidence support the complaint. Union's manager testified only that he had been told that Public Service Company used its natural gas service, and construction deposits, in this manner. The witnesses who appeared, however, who had actual experience in obtaining the two services, testified generally to the contrary. One developer did not want the cooperative's service; Public Service Company required a gas construction deposit of $50,000. Another took the cooperative's service, paid a gas deposit of only $5,000. Another said that though initially he was informed that a gas deposit of $50,000 would be required, he was later told it would not be, if electric service was taken, and in fact, none was required of him. Another never considered the relative merits of the two services; no gas deposit was required. All of the deposits required have since been refunded. We can find no pattern of objectionable practice by Public Service; rather, it appears that deposits were required or not, and if required were gauged on the basis of all the facts and circumstances surrounding the particular transaction.

We conclude that the complaint against Public Service Company, to-wit: Case No. 5108, should be dismissed in its entirety.

Regarding Assignment of an Exclusive Service Territory to the Cooperative

Upon mature consideration, we have concluded that we cannot, at this time, in the present condition of affairs, dispose of all of the problems involved in this proceeding with justice to the parties or benefit to the public. The reasons will appear in a moment. However, we feel that we should dispose of as many problems as circumstances will permit, and enter appropriate orders as to the rest. This will lay a groundwork which may eventually allow satisfactory disposition of the rest of the problems. So that our disposition of the mat[illegible] will be clear, however, we will state all of the controlling considerations affecting our decision.

As counsel have recognized, the cooperative is nothing more nor less than its members. These people, not receiving the benefits of central station electric service, joined forces cooperatively to obtain service for themselves; what they could not do individually, they accomplished cooperatively. This self-reliant, do-it-yourself effort is in the great tradition of the American pioneer. We think that these people are entitled to have their service protected.

Union now seeks to drop its neighbor and neighbor characteristic, however, and enter the field of profit-making with other utilities. It wants to sell outside the clan; and more, it wants a monopoly upon certain territory, so that new people coming into that area will be forced to buy from it and no one else. It does not seek merely to obtain protection, so that if a load connected within mining, oil, or other natural resource put there by nature occurs, it will have first claim; it wants to seize a portion of Denver's expansion, and exclude everyone else from the portion it claims.

However, due regard must be had for the interests of others who made their financial commitments before Union changed its policy. If it would enter the field, it must recognize that others are already there; it must find its place from among the places that remain.

The utilities already in the field are alone physically qualified, at the moment, to serve large load customers and to invite industry into the Denver area with unquestioned assurance that large-load service is available when needed. They have proceeded vigorously to make new large blocks of power available, and to build the expensive high-voltage transmission facilities required, in advance of the critical day of need. Union contends that when considering its qualification to serve, we should consider that Public Service's power facilities are available to Union. However, we are not of a mind to order Public Service to commit

millions of dollars in generating plant, so that Union can use the resulting power to deprive Public Service of a part of the territory it serves.

Even if we were so inclined, it is not apparent, nor suggested, how we could actually accomplish the result. Power purchase contracts involve agreement upon many engineering details of supply, delivery, and cost. Both parties to such contracts have a great deal to protect in such negotiations; they involve decisions on both sides as to how much can be given to obtain this benefit or that. Exhibits 18 and 19 are examples of such agreements. We are in no position to make these complicated decisions for the parties by fiat; we have no authority to make a contract for them. We are thus not able to consider Public Service Company's power as part of the cooperative's qualification to serve.

We believe that any decision which would tend to impair the existing utilities' ability to complete projected expansion of facilities would be detrimental to the public, not only in this immediate area of contest, but in Denver, in all of its suburbs, and indeed, in a large sense, throughout Colorado.

We find that the cooperative has failed to show by its evidence that the public convenience and necessity require, or will require, that it be assigned an exclusive service territory; or indeed that the public would benefit at all from such an assignment.

Turning, then, to orders which must be entered concerning territory, it appears that the only outright exclusions we must order, on the basis of investments already made, are from areas heretofore certificated to one or another utility, and from incorporated cities and towns, which Union has not asked authority to serve.

An exclusive service territory is, of course, nothing more nor less than a State-protected monopoly; a customer for a particular type of utility service in such an area is com-

pelled to buy from the enfranchised utility, and no other. Without discussing at the moment the justification for such monopolies, it seems obvious that they should not be granted, and free competition be thus inhibited, unless the public in the area will obtain some benefit that it would not have, absent the monopoly. In short, a showing must be made that the public convenience and necessity require the granting of the monopoly, before it can properly be granted.

Similarly, when such a monopoly has once been granted, upon a finding of public benefit, it would appear that we have a duty to the public to protect that benefit by cooperating in general with the enfranchised utility to prevent encroachment by others, until it appears that the public interest will best be served by some different course of action. The property right of the utility in its investment, which it would lose if ousted, would also appear to merit consideration. Union here has made no showing that the public would benefit by ousting the existing utilities from their certificated areas, in favor of the cooperative. There is no evidence that service in these areas is inadequate in any respect, or unreasonable in cost. Union must, therefore, be excluded from areas heretofore certificated to others.

In addition to cities and towns in the territory, two areas, described in detail in numbered Paragraphs 1 and 2 of the Order portion of this decision, were certificated to utilities in 1937. These two areas are in the Arvada-Westminster vicinity, and in the vicinity of Keenesburg. So far as we are informed, the cooperative is serving only members in these areas.

An Order discussed below, imposing limitations upon line extensions, will adequately protect the existing utilities' other certificated facilities.

It appears that under this reasoning, Union will be required to remove its existing lines in some areas. This

may seem a harsh rule; however, Union entered these areas with its eyes open; all were certificated, by public proceedings and of public record, before Union entered. In the Westminster area, Public Service Company's primary and transmission lines were within a few blocks of the new subdivision in certificated territory, when Union built in to serve the subdivision. We have explained our views, *supra*, concerning certificated areas. Union appears to be blowing hot and cold; it asks to have a certificated area set aside for it, at the expense of certificated areas of others, without showing cause, other than its own desire, for breaching the security of existing certificated areas.

Union, by building into certificated territory without prior authority, has put affairs in such condition that someone must now suffer. If certificates have any significance, Union must leave these areas. In the case of *Ohio and Colorado S. and R. Co. v. P.U.C.*, a utility, in a rate case, sought return upon an unwarranted investment. Our Supreme Court, in denying it, said:

> "It appears also that that Power Company made these improvements without having obtained the approval of the Utility Commission, or obtaining a certificate of necessity, in direct violation of the statute. It is the very purpose of the statute in this particular to prevent the burden to the public which may arise by reason of speculative or unnecessary extensions and improvements, by means of an investigation by the Commission, and the granting of a certificate of necessity.
>
> "The Power Company had no lawful authority to make such extensions and improvements and did so in plain violation of law. If, therefore, it made an unprofitable investment it must bear the burden . . . It is not the purpose of the Public Utilities Law to make the State an insurer of unlawful, unwise or unnecessary investments . . . The equities are not with the Power Co."

So here, the equities are not with Union. It may be that it can dispose of its facilities in certificated areas to the existing utilities. In two previous instances it was content to remove its facilities upon being paid the cost of relocating them. In the present case, the certificated utilities, investing prudently, might do well to buy the facilities, to be included in their rate base, rather than build new facilities, if a purchase price less than the cost of new construction could be negotiated. Our order for removal will, of course, be conditioned upon the assumption that the existing utility is actually serving the area; that it is willing to commence service to customers affected by our order without interruption of service, and without extension or connection charge of any sort, since facilities already exist, other than the standard meter deposit requirement. Union will not be required to remove lines from any existing utility's described certificated area until written agreement of that utility to meet these conditions is filed with the Commission, and a copy thereof served upon Union.

In addition to the protection acquired pursuant to certificates, utilities may become entitled to protection by independent operation of law; either by "Grandfather Rights" or by provision of specific statute. The protestants offered no proof concerning their undoubted "Grandfather Rights;" our decision does not rest upon their existence. The specific statute applicable ('53 C.R.S. 115-5-1) provides:

> "No public utility shall begin the construction of a new facility, plant or system, or of any extension (thereof) without first having obtained from the Commission a certificate . . . Sections 115-5-1 to 115-5-4 shall not be construed to require such certificate for an extension . . . into territory . . . contiguous to its facility, or line, plant or system and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business."

It will be noted that this statute has two principal aspects: (1) it affirmatively permits building into "contiguous" areas without a certificate, and (2) it prohibits a utility from extending into territory *theretofore served* by a public utility of like character *until it obtains a certificate for such construction.* The word "contiguous" is associated with permission to extend, the words "theretofore served" with protection of territory.

The only court decision which has come to our attention regarding this statute is *Public Utilities Comm. et al. v. City of Loveland,* 87 Colo. 556, 289 Pac. 1090 (1930). There, a regulated municipal utility, without prior authority, built into a farm area adjacent to the city, but near existing facilities of Public Service Company. Public Service Company sought, and obtained, a cease and desist order, the Commission finding as fact that it was serving the territory. Our Supreme Court affirmed the Commission's decision, finding no basis for reversing the Commission's determinative finding of fact.

In the present case, each party claims it has been "serving the territory" in which it operated. The effect of the statute, which is controlling, is discussed below. The statute aside, and from a public viewpoint, however, "territory" is not served; only customers—people—are served. The utilities, if they were serving the territory at the time Union developed and installed its lines, were doing so only in a technical sense. Doubtless, the economic realities of the time made it difficult, if not impossible, for the utilities to serve everyone in the area. The fact is, however, that they did not serve everyone. If they had, Union could never have come into existence; it would have found no one to serve. Union was nurtured on customers the utilities did not serve; and in the case of the Public Service area, this occurred with the existing utility's help and blessing. The existing utilities' failure to supply all of the needs of their territory, whatever the reason, has now come home to roost. The cooperative is a fait accompli;

it is in existence, serving customers; has been for years. The utilities, even now, do not propose to substitute their service for the existing cooperative service to these customers. The cooperative is there to stay, so far as this Commission is concerned.

We hasten to point out, for we think it important to the future of this area, that the management of the utilities involved is in different hands now than it was when the cooperative got its start. Present management has provided excellent service for people throughout their systems. By and large, the situation confronting present management is not of its own creation; but it must shoulder the burdens of its predecessors.

We turn, then, to the claim of Union that it has heretofore been entitled to the protection of this statute. We do not agree.

In the last analysis, the only source of income of a regulated utility is the public it serves; all of the utility's costs must be met from this source. The public must stand the burden, then, of utility waste and inefficiency, where it occurs. It is precisely to protect the public in this regard that the utility law was enacted.

> "One of the chief purposes of requiring a certificate of convenience and necessity is to prevent the unnecessary duplication of facilities and to protect the consuming public from inadequate service and higher rates which frequently result from such duplication."

If a company, without prior authorization, can build duplicating lines wherever it chooses, across streets and up alleys where service is actually being rendered, and become entitled thereby to demand and receive protection of its lines and investment, regulation is meaningless.

Every utility would be at the mercy of future, unknown competitors who could pop up, jack-in-the-box fashion, throughout its service area. No established utility could

venture the capital required to serve, if this risk hovered over its entire operation; nor should the public be burdened with the rate cost of duplicate investments which would result from such after-the-fact regulation.

We conclude that Union cannot become a utility in such manner as to become entitled to protection pursuant to the quoted statute, until the Commission completes an investigation as to public need for the proposed service, and issues a certificate of convenience and necessity, as we are now doing. Court decisions brought to our attention which may appear to be to the contrary are not so in fact. In each of those cases, an organization was found to be a utility at some earlier time than we suggest here, in connection with a proceeding to stop its operations entirely, or was found not to be a public utility at all. In no case brought to our attention was an organization found to be entitled to protection by the State prior to the time a certificate issued to it.

We are now issuing Union a certificate; it thus becomes entitled to protection from here forward. To give it this protection, we must necessarily direct some orders to the protesting utilities regarding their future expansion.

The protection given by statute to any utility is protection against encroachment upon territory it is serving at the time. We must, therefore, administratively determine what territory each party is serving, in order to find what territory each is entitled by statute to have protected.

Each party asserts that its territory includes all open ground between its lines and the lines of the next utility neighboring. Each aggressively asserts that it now holds itself out to serve, and actually is serving, all of this intervening territory. Their activities in seeking new business even to the extent of overbuilding one another, bear them out. In the present circumstances, we find as fact that indeed all of the parties are aggressively serving the territory in issue in this proceeding, and that new construction

by any party may well interfere with the operation of some other party's facilities. This being true, if all three are regulated public utilities, and they are, by our present decision, then none of them can make any extension without entering territory which is being "served by a utility of like character." All extensions will thus require prior authority with the obvious exception of extensions made better to serve existing customers, and extensions within and to areas, including cities and towns, already certificated.

However, to freeze all electric services at present locations and levels would bring this area's growth to a halt, in our opinion.

If Public Service Company is to continue to provide new blocks of power in advance of need, it must have outside funds to finance this expansion. These cannot be obtained if an end is put to the Company's load growth potential. Industrialists considering moving here want large power resources to be available from integrated companies. The disputed area is ideal for industrial location; it has the large vacant acreage, the climate, the water, sewage disposal facilities, skilled labor supply, rail and highway facilities, warehousing, housing and other attributes of an ideal area for such development. In its present state of development and size, Union is not attractive to new, large industry as a power supplier. If the area is to grow, power must be provided in advance of need; industry looking for new location wants power available as soon as its plant is built. System reserves, to avoid power shortage in case of outage at times of peak demand, are significant; only on a big system are big reserves possible. The Boeing Company, who considered locating here but were ordered to use existing facilities elsewhere, sought an initial supply of 10,000 kilowatts of power for itself alone, not considering the housing and collateral activity it would create. Union's entire firm supply at present is only 3,600 kilowatts, and that is almost entirely committed. As indicative of the

magnitude of investment in power facilities required, Public Service Company currently has under way a ten-year $195,000,000 expansion program; the cooperative's total investment to date is less than $2,500,000. We conclude accordingly that it would be contrary to the public interest to certificate to the cooperative the area it seeks.

However, as we have stated above, to freeze all electric service at present locations and levels, would bring to a halt the growth of the area here involved. We must, therefore, evolve some procedure that will permit this growth taking into consideration all of the conditions confronting us.

There are other considerations which will condition our future proceedings, but which we do not feel warrant orders at this time. These considerations had bearing, however, in arriving at the following Order, and we should therefore explain them.

We believe that it would be contrary to the public interest to attempt at this time by order of the Commission to redistribute lines and customers of the various parties, in order to arrive at fairly homogeneous areas of service, one of which could be exclusively certificated to Union even if this could lawfully be done. Evolution will serve the public better than revolution in this matter. Primary lines of the companies somewhat resemble limbs of a tree; to pluck off a customer at the end of a line, and attach him to the end of an adjacent party's line, might not greatly disrupt service; but to pluck off a customer near the base of a limb might well isolate the customers farther out; certainly it would increase the cost of serving them, since the line expense would be the same, but the revenue would be reduced. From the record, it is not possible to tell how far back a line-end of one party or another could economically or equitably be pruned. A good example, of many which could be cited, is the parallel-line situation, shown on Exhibit V, Map 57, ending in Section 20. Nor are all cus-

tomers alike, freely interchangeable; two customers will vary in the amount of revenue they produce, and will vary, even in rural areas, in their effect on system load. A customer entirely residential in a rural area may increase the total demand for power at critical peak times; a small manufacturing operation of the same load in the same area might be served at off-peak times, and thus be a more profitable customer for the same volume of energy used. Nor are all primary lines the same: single-phase lines provide many types of service, while three-phase lines are necessary to other types. No details are in the record concerning these matters, to permit equitable redistribution. In addition, it is not certain that the receiving utility would consent to serve, or could be compelled to serve, or indeed be economically able to serve, the redistributed customer. Some disruption of service would almost inevitably result: no estimate can be made from this record how widespread it would be. No corresponding benefit is apparent, to justify the disruption and inconvenience. During the time it would take to investigate all the details not presently shown, industry and commerce is coming into the area, requiring new capital commitments by one or the other of the parties, and making the situation even more confused and difficult to solve. Some method of accomplishing the desired result, other than the imposed mandate of the Commission, must therefore be found. If the parties are held in approximate status quo for a time, the ends desired can be accomplished with minimal dislocation and maximum benefit to the public and the parties. Caution must be exercised, of course, not to inhibit growth in the meantime.

Experience demonstrates that maximum benefit to the public often results from the assignment of exclusive service area, followed by close supervision of the assignee. As matters now stand, however, we do not feel we are authorized to set aside territories, and order each party to remove its facilities and give up its investment in the other's terri-

tory. This may be accomplished over a period of time, however, with justice to all. We feel it is a result all should point toward.

Acting in the expectation that the parties will cooperate in an effort to resolve their differences, we should leave a procedural door ajar for them to adjust these differences seriatim at minimum expense, inconvenience and delay. It appears that extension of service by secondary line to a point more than 300 feet distant from the primary line is not economical, nor do such long secondary extensions hold voltage well or provide good service. Any significant change in status will therefore require extension of primary line. Our statute ('53 C.R.S. 115-3-4), concerning rate changes, establishes a pattern suitable to our purpose here, when it provides for a filing to be made, to become effective in a specified time unless sooner suspended. We will base our order on such a pattern. The procedure can be changed when circumstances warrant in the future, to meet the needs of the parties and the public. Extensions made for the sole purpose of providing increased power to an existing customer, or to or within exclusively certificated area, shall not require such filing or prior approval. Thus, if the parties are able to agree, or one is unable to serve, a quick and easy method of obtaining approval will be available, and yet we will stay in a position to take whatever action circumstances may warrant.

FINDINGS

THE COMMISSION FINDS:

1. The foregoing Statement is, by reference, incorporated herein.

2. The Commission has authority over the parties and subject matter of this proceeding, and is fully informed herein.

3. The evidence does not support the complaint of the Union Rural Electric Association, and Case No. 5108 should be dismissed.

4. The territory involved in this proceeding is described in Appendix A to this Decision; that Appendix is, by reference, incorporated herein, and made a part hereof. Certain areas more fully described in the following Order, and located within the territory described in Appendix A have heretofore been certificated to existing utilities. It is not shown that existing service in these certificated areas is inadequate or unreasonably priced. Union should be directed to remove its facilities from these certificated areas.

5. The public convenience and necessity require that Union be declared to be a public utility, authorized to distribute electricity non-exclusively in the uncertificated and unincorporated portions of the territory described in Appendix A. To this extent, the application should be granted. Appropriate Orders should be entered to put Union of record as a regulated public utility.

6. Union is now serving all of the territory described in Appendix A, except areas heretofore certificated to utilities and except within incorporated municipalities. Public Service is now serving all of the territory described in Appendix A, except the area served by Colorado Central. Colorado Central is serving all of that portion of the territory described in Appendix A which is illustrated by Exhibit 101 in this proceeding, which is, by reference, incorporated hereinto, and made a part hereof.

7. All parties should be prohibited from making any extension of facilities, or extensions in the aggregate, exceeding 300 feet in length, anywhere in the area described in Appendix A without prior authority from the Commission, in accordance with the Order to follow.

8. The present and future public convenience and necessity require that each party be authorized to increase the volume of energy it delivers to any connected customer without further authority from the Commission, and to do

all things reasonably necessary to make such increased deliveries. All parties should be given authority accordingly.

9. The present and future public convenience and necessity require that each party be authorized to extend its facilities to and within areas from time to time certificated to such party, without limit, without further authority from the Commission.

10. The procedure by which the parties can obtain additional authority should be simplified, but remain subject to effective control by the Commission. The procedure established by the Order herein meets these requirements; such procedure may be altered from time to time as circumstances warrant in particular cases.

11. No showing of public convenience and necessity has been made, sufficient to warrant setting aside an exclusive service territory for Union, nor for authorizing Union to serve in any incorporated city or town. In these respects, the application should be denied.

12. Orders should be entered accordingly.

ORDER

THE COMMISSION ORDERS:

That Union Rural Electric Association, Inc., be, and is hereby, declared to be a public utility authorized to distribute electricity, non-exclusively, in the uncertificated and unincorporated portions of the territory described in Appendix A attached hereto, which is, by reference, incorporated herein, and made a part hereof. Said Association shall operate subject to the further provisions of this Order, and subject to regulation by this Commission pursuant to authority now and hereafter vested in the Commission by the Legislature and People of the State of Colorado.

Union Rural Electric Association, Inc., shall file, on forms prescribed by the Commission, its rate schedules, rules and regulations, set up its books and accounts in accordance with the Uniform Classification of Accounts, and bring all its practices as to testing, consumers' deposits, and operations, records of meters, transformers, and complaints into compliance with the Commission's requirements, within twenty (20) days from the date this Order becomes effective.

Union Electric Association, Inc., shall commence, on the day this Order becomes effective, and proceed with due diligence, to remove its lines, wires, and other facilities from areas heretofore certificated to existing public utilities, which areas are described as follows:

1. An area bounded by a line beginning at the intersection of Clear Creek and the Mt. Olivet Road; thence running east along Clear Creek to the intersection of said Clear Creek and a line 300 feet north of and parallel to West 44th Avenue; thence east along said line 300 feet north of and parallel to West 44th Avenue to a point half way between Byrne Place and Elsie Place; thence north to the south side of the Denver and Intermountain Railroad tracks; thence east along the south side of the above-mentioned tracts (sic) to the intersection of Harlan Street and the said Denver and Intermountain Railroad tracks; thence north along said Harlan Street to its intersection with the southerly bank of Clear Creek; thence easterly along the south bank of Clear Creek to the intersection of Mead Street produced and Clear Creek; thence north along said Mead Street to West 61st Avenue; thence east along West 61st Avenue to its intersection with North Federal Boulevard; thence along a straight line drawn in a northeasterly direction to the northeast corner of Section Thirty-three (33), Township Two (2) South, Range Sixty-eight (68) West; thence due north to the northeast corner of Section Sixteen (16), Township

Two (2) South, Range Sixty-eight (68) West; thence due west to the northwest corner of Section Seventeen (17), Township Two (2) South, Range Seventy (70) West; thence due south to the southwest corner of Section Eight (8), Township Three (3) South, Range Seventy (70) West; thence due east to the southeast corner of Section Seven (7), Township Three (3) South, Range Sixty-nine (69) West; thence due south to the southwest corner of Section Seventeen (17), Township Three (3) South, Range Sixty-nine (69) West; thence due east along the south line of Section Seventeen (17), Township Three (3) South, Range Sixty-nine (69) West half way across said Section Seventeen (17); thence in a straight line southerly to the point of beginning.

2. Townships 1 and 2 North, Ranges 62, 63, and 64 West of the 6th P. M.,

and from areas within incorporated cities and towns within the area described in Appendix A.

PROVIDED, HOWEVER, That this portion of our Order shall in no event become effective earlier than fifteen days from the time Public Service Company of Colorado and Colorado Central Power Company shall file with the Commission and serve upon Union Rural Electric Association, Inc., in manner provided by Colorado Rules of Civil Procedure, a statement evidencing their willingness to serve all customers affected by this portion of our Order without interruption and at no extension or connection charge whatsoever, except only standard meter deposits. Union Rural Electric Association, Inc., shall not disconnect service to any customer affected by this paragraph (unless requested by the customer), until such time as such customer can obtain immediate service from the utility certificated in that area.

Except as herein and hereafter expressly authorized by the Commission, no extension of facilities shall be made

by Public Service Company, Colorado Central, or Union, without prior authority from the Commission. Parties desiring such authority may make application therefor in either one of two ways:

(a) By the filing of an application with the Commission in the prescribed manner as set forth in the Commission's Rules of Practice and Procedure. This method contemplates notice of hearing to all parties and the issuance of an order by the Commission, after hearing.

(b) The filing of an application with the Commission and serving copies on interested party, or parties, requesting authority to construct the facilities without the necessity of a hearing. The application shall state in detail the plan for construction so as to permit the Commission and affected utilities, if any, to determine what action they may desire to take with reference thereto. An interested party shall be deemed one having electric transmission or primary distribution lines within one mile (airline) of any part of the proposed extension. If no protests are received by the Commission, and the Commission, on its own motion, does not suspend the effective date and set the matter down for hearing, the application as filed shall be deemed to be in the public interest, and an order shall thereupon be issued as a matter of course on the sixteenth (16th) day after said filing with the Commission, approving said construction. If the Commission sets the application for hearing, it will be treated from then on as in (a) above.

All parties shall be permitted, without further authority, to make extension of their facilities, or extensions in the aggregate, which do not exceed 300 feet in length.

All parties shall be permitted, without further authority from the Commission, to do all things necessary to deliver increased quantities of power to their respective connected customers, without limit.

All parties shall be permitted, without further authority from this Commission, to extend facilities without limit

to or within the corporate limits of towns and cities as to which they hold authority from this Commission to exercise franchise rights, and to and within areas as to which they hold exclusive service certificates.

Jurisdiction is retained to make such other and further Orders as may be necessary or convenient to accomplish the foregoing objectives.

In all other respects, Application No. 13576 is denied.

Case No. 5108 be, and the same hereby is, dismissed.

This Order shall become effective twenty-one (21) days from the date hereof, except as otherwise provided herein.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RALPH C. HORTON

JOSEPH W. HAWLEY

Commissioners

COMMISSIONER JOHN P. THOMPSON DISSENTING.

Dated at Denver, Colorado,
this 7th day of January, 1957.

mw

(SEAL)

ATTEST: A true copy:

J. J. MAHONEY,
Secretary

Commissioner Thompson dissenting:

I agree with most of the majority decision. Though my area of difference is small, yet it is vital to the whole problem. It appears to me that by treating the vastly different parties as though they were equals, my colleagues may hurt all the parties, compounding instead of solving the problem.

The cooperative's assured power supply is only 3600 kilowatts; over 3400 of this is already taken by present customers. Public Service, on the other hand, generates 515,000 kilowatts on the Eastern Slope alone, and has 100,000 kilowatts of standby reserve. When it comes to heavy jobs, a good heavyweight will always lick a good bantamweight. Some may hopefully declare that they are equals, but wishing won't make it so.

Nor is there any warrant for tying down Public Service as to large loads. In sixteen years of unrestricted operations, the largest single load the cooperative has ever acquired is 160 kilowatts. It never has served large loads. It is not capable of serving them now. Yet my colleagues, while stating that only Public Service is capable of serving large loads, require it to file on all new loads, regardless of size, outside a small certificated area, subject to protest by the cooperative.

I believe this raises a grave risk of stopping this area's growth. As the cooperative is physically incapable of rendering large-load service, I see no justification for even risking this possibility. The area cannot continue to grow, without additional high-voltage generating and transmission facilities. These must be built in advance of need. Can Public Service, or anyone, build them, knowing it may have to fight the cooperative for months before it can use them? This being true, will it be able at minimum cost to get financing to build the facilities at all? What will be the attitude of businessmen scouting new locations, when told that no one can guarantee them service until after Commission hearing and possible judicial review?

Dozens of questions have been considered in arriving at our decision; the striking thing is that our area of disagreement is so small. Yet anyone who thinks the decision is all on one side will do well to read it again. The writer of any dissent knows that nothing he can say now will affect the decision in any way; the matter has been decided, and he has been outvoted. He ponders whether any purpose will be served by stating publicly the arguments which failed to impress his colleagues. At last he concludes that there is indeed one useful purpose a dissent may serve: To remind any party which considers itself triumphant that a victory so narrowly won must be pursued with wisdom and prudence.

JOHN P. THOMPSON
Commissioner.

Dated at Denver, Colorado,
this 7th day of January, 1957.

mw
(SEAL)

ATTEST: A true copy:

J. J. MAHONEY,
Secretary

NOTE. The nine (legal size) sheets, entitled APPENDIX A, and consisting of descriptions of land by sections, quarter-sections, etc., is omitted. The MAP accompanying this Application shows visually the lands described in said APPENDIX A.

EXHIBIT B

District Court Decision

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. B-14704

Division VII

FINDINGS and JUDGMENT

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation,

Plaintiff,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; and RALPH C. HORTON, JOHN P. THOMPSON and JOSEPH F. NIGRO, the individual members of said Commission,

Defendants,

UNION RURAL ELECTRIC ASSOCIATION, INC., a Colorado corporation,

Intervenor,

COLORADO CENTRAL POWER COMPANY, a Delaware corporation,

Intervenor.

This is an action to review a decision of the Public Utilities Commission of the State of Colorado.

Union Rural Electric Association, Inc., a Colorado corportion organized in 1938 to generate or purchase electrical energy for sale to and use by its members only under a cooperative form of membership, filed an application for a certificate of public convenience and necessity with the Public Utilities Commission of Colorado, and joined with the application a complaint against Public Service Company of Colorado, a regulated, operating public utility.

The application asked the Commission for a Certificate of public convenience and necessity authorizing the Union Association to serve exclusively electric energy in an area

north of Denver described in the application and requested the Commission to determine it to be a public utility, and to declare that Union Association has been a public utility since its inception, or at least since it began actually supplying electric energy to its members.

The complaint against Public Service Company alleged encroachments of Public Service Company in a territory considered by Union Association as part of its service area, and alleged that Public Service Company had improperly used its natural gas service to obtain customers for its electric service.

Public Service Company filed a protest to the granting of the application and an answer to the complaint and Colorado Central Power Company, a regulated operating public utility, a Delaware corporation, likewise filed a protest to the granting of the application of the Union Association. The Commission designated the application as "Application No. 13576" and the complaint as "Case No. 5108", and all parties agreed that the application and the case should be heard and decided upon a consolidated record. Hearings were accordingly held, continuing at intervals over a period of about one year, and on January 7, 1957, the Commission handed down its decision on the application and the case, designated as Decision No. 47074. It is this decision that is the subject matter of this review. Public Service Company filed its complaint in this court wherein it prayed for modification or setting aside of certain portions of the orders of the Commission and for an order requiring the Commission to certify to this court a transcript of the records, exhibits, etc. in connection with application No. 13576 and case No. 5108. Union Rural Electric Association, and Colorado Central Power Company were permitted to intervene and all parties have participated in the trial of the cause. Union Association was given leave to file what it calls a pleading in the nature of a cross complaint against the Public Utilities Commission wherein it set up objections to

certain orders of the Commission, thus making an issue of certain orders which had not up to that time been specifically attacked.

Pursuant to order of Court, the Commission submitted and certified to the court the complete transcript of the record, exhibits and proceedings in application No. 13576 and case No. 5108.

Trial to the court on the issues raised by the pleadings was held in May, 1957. Briefs were filed by all parties, the last one in February, 1958. Nine separate briefs are on file with the court.

The record is voluminous. The transcript of testimony before the Commission is contained in ten separate volumes aggregating 1518 pages, and the exhibits fill a large cardboard carton.

The Commission dismissed case No. 5108. It held and decided that Union Company did not become a Public Utility until some time between October 17, 1955 and February 16, 1956 and that the acts complained of in case No. 5108 occurred prior to June 30, 1955, the date of the filing of the complaint with the Commission. The statute relied on by Union as a basis for its complaint refers to acts or things done or omitted to be done by a public utility and Union not being a public utility at the time the acts complained of were committed, the Commission held that case No. 5108 should be dismissed. The Commission also held that the evidence as to the allegations that Public Service was improperly using its natural gas service as a lever to obtain customers for electric service was insufficient to warrant any orders by the Commission. Concerning the application of Union for a certificate, the Commission made several findings and orders.

1. It held that it had jurisdiction in the matter.
2. It held that Union should be declared to be a public utility, not as of 1938 as prayed for in the application, but as of some time between October 17, 1955 and February 16, 1956.

3. It held that public convenience and necessity for regulation and thus for the issuance of utility authority to Union Association was shown by the circumstances of existing service.

4. It denied the request of Union for authority to serve exclusively electric energy in certain territory and denied Union's application for authority to serve in any incorporated city or town.

5. It ordered Union Association to remove its lines, wires and other facilities from certain areas described in the order.

6. It declared Union Association to be a public utility, authorized to distribute electricity non-exclusively in the uncertified and unincorporated portions of the territory described in Appendix "A" attached to the decision and ordered that Union Association shall operate subject to regulation by the Commission.

7. It declared that Union was serving all the territory described in Appendix "A" except areas heretofore certificated to utilities and except within incorporated municipalities; that Public Service Company was serving all of the territory described in Appendix "A" except the area served by Colorado Central; that Colorado Central was serving all of that portion of the territory described in Appendix "A" which is illustrated by exhibit 101.

8. It ordered that all parties were prohibited from making any extension of facilities or extensions in the aggregate exceeding 300 feet in length anywhere in the area described in Appendix "A" without prior authority from the Commission except to or within the corporate limits of towns and cities as to which they hold authority from the Commission to exercise franchise rights, and to and within areas as to which they hold exclusive service certificates. The

procedure for obtaining permission was also outlined in the order. A further exception to extensions of facilities without permission related to extensions made for the sole purpose of providing increased power to an *existing* customer. As to this exception the Commission said:

> "The present and future public convenience and necessity require that each party be authorized to increase the volume of energy it delivers to any connected customer without further authority from the Commission and to do all things reasonably necessary to make such increased deliveries."

Public Service Company alleges in its complaint that the decision of the Commission, so far as it affected Public Service Company constitutes an abuse of discretion, is unlawful, unjust, unwarranted, beyond the scope of the jurisdiction of the Commission and is contrary to the evidence and to the rights of Public Service Company.

Colorado Central Power Company asks the court to modify or set aside so much of the decision as affects it as being contrary to law, an abuse of discretion, contrary to the evidence and a violation of its rights. Union Association's answer to the complaint prays that the complaint be dismissed or that the Commission be affirmed as to those parts of the order objected to by Public Service Company. In its cross complaint, Union attacks the orders of the Commission referred to supra which concern Union Association and its activities and status and asks the court to set aside or modify the parts of the decision complained of in the cross complaint. The Commission, by its answer, says that its decision is lawful and just; that it did not abuse its discretion or authority or jurisdiction; that its conclusions are supported by the evidence and that its findings and decision should be affirmed.

Concerning the authority of the district court on a matter of this kind—chapter 115, article 6, section 15 C.R.S. provides *inter alia*, as follows:

> "On the return day, the cause shall be heard by the district court, unless, for a good reason shown, the same be continued. No new or additional evidence may be introduced in the district court, but the cause shall be heard on the record of the Commission as certified by it. The review shall not extend further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of Colorado, and whether the order of the Commission is just and reasonable and whether its conclusions are in accordance with the evidence . . ."
>
> ". . . Upon hearing, the district court shall enter judgment, either affirming, setting aside or modifying the order or decision of the Commission . . ."
>
> "A writ of error may be taken to the Supreme Court from any final judgment of the district court on review, affirming, setting aside or modifying any order of the Commission in the same manner and with the same effect as writs of error are taken from judgments of the district court in all other civil actions."

Concerning the extent of the supreme court's authority on matters of this kind, the court said in *Parrish v. Public Utilities Commission*, 134 Colo. 192,

> "The extent of our consideration of the matters here presented is limited to an examination of the testimony and the record and from that determine whether there is competent testimony to support the findings of the Commission and to determine whether the Commission's order is just and reasonable and whether it acted

in excess of its powers. We are not at liberty to substitute our judgment for that of the administrative body even if we were so inclined."

From the statute quoted above and the decision in the Parrish case, it clearly appears that when an aggrieved party to a proceeding before the Public Utilities Commission wishes to have the action of the Commission reviewed by a court, he may do so by following the procedure outlined in the statute and not only may he have one review by a court but two reviews, one by the district court and one by the supreme court, both courts making determinations and decisions based on the same identical record.

The supreme court must determine from the record made before the Commission how to decide the case. What the district court said, or why it arrived at certain conclusions, is of no help or benefit to the higher court. As a final order, of course, the supreme court must say whether the district court's judgment is to be affirmed or reversed, but except for that final statement, the entire decision of the district court can ordinarily be ignored. It is a matter of public knowledge that in an effort to improve the administration of justice, judicial councils, bar associations and other similar groups have recently in Colorado suggested the elimination of the double, full-dress review by two courts of decisions of administrative boards, commissions and the like, by providing for only one review, and that one by the supreme court. In view of these facts, it seems to the court that a detailed analysis by this court now in this opinion of the evidence before the Commission as to each of the many findings and orders of the Commission, together with explanations and reasons why certain conclusions are reached and certain judgments entered in deciding this case will only serve to further delay and postpone the final determination by the highest court of the controversy between the parties to this cause. The court has read and reread much of the testimony adduced at the hearings before the Commission; it has read the decision of the Commission many times; it

has read, re-read and studied all of the briefs submitted and has studied the full text of many of the cases cited and quoted from in the briefs; it has examined all of the maps and many of the exhibits, and has read the transcript of the argument of counsel presented at the trial. From this study, a conclusion has been reached as to what the decision should be and the court is firmly convinced that the final words at the end of the few pages making up this opinion and handed down this day, are identically the same as would appear at the end of a decision and opinion of several times as many pages, and filed perhaps several weeks hence.

The court finds and determines that in rendering decision No. 47074, which decided and determined application No. 13576 and Case No. 5108, pending before it, the defendant, The Public Utilities Commission of the State of Colorado regularly pursued its authority; that the said decision does not violate any right of the plaintiff, Public Service Company, or of the intervenors, Union Rural Electric Association and Colorado Central Power Company under the Constitution of the United States or of the State of Colorado; and further finds that the said decision is in all respects just and reasonable and its conclusions as therein contained are in accordance with the evidence adduced at the hearings on said application No. 13576 and case No. 5108. The court further finds that in rendering said decision and making the orders therein set forth, the Commission did not abuse its discretion, exceed its jurisdiction or authority, act arbitrarily or capriciously or in anywise unlawfully or unreasonably.

Accordingly it is ordered, adjudged and decreed by the court that the order and decision of the Commission No. 47074 is in all respects affirmed. The necessity of filing a motion for new trial as to each of the parties hereto is dispensed with.

Time and until 60 days from this date is allowed for the presentation to the court of reporter's transcript and record.

Done and signed in open court this 25th day of April, 1958.

BY THE COURT:

/s/ ROBERT W. STEELE

Judge

EXHIBIT C

Supreme Court Opinion

No. 18698

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation,

Plaintiff in Error,

v.

THE PUBLIC UTILITIES, COMMISSION OF THE STATE OF COLORADO, and RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, the individual members of said Commission, UNION RURAL ELECTRIC ASSOCIATION, INC., a corporation, and COLORADO CENTRAL POWER COMPANY, a corporation

Defendants in Error.

Error to the District Court of the City and County of Denver
Honorable Robert W. Steele, Judge

EN BANC

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

Messrs. Lee, Bryans, Kelly and Stansfield
Mr. Bryant O'Donnell,
Attorneys for Plaintiff in Error.

Mr. Duke W. Dunbar, Attorney General,
Mr. Frank E. Hickey, Deputy Attorney General,
Mr. Henry E. Zarlengo, Assistant Attorney General,
Attorneys for The Public Utilities Commission of the State of Colorado, and Ralph C. Horton, John P. Thompson, and Joseph F. Nigro, Defendants in Error.

Messrs. Grant, Shafroth, Toll, Chilson and McHendrie,
Mr. Erl H. Ellis,
Attorneys for Union Rural Electric Association, Inc.

Messrs. Allen, Lynch and Rouse,
Attorneys for Colorado Central Power Company.

MR. JUSTICE HALL delivered the opinion of the Court.

On June 30, 1955, Union Rural Electric Association, Inc., a Colorado nonprofit co-operative corporation, herein referred to as "Union," filed with the Public Utilities Commission of the state of Colorado, herein referred to as "PUC":

1. Its application for (a) a certificate of public convenience and necessity to serve with electrical energy an area *around* Brighton, Colorado; (b) for clarification and ratification of its existing rights to serve such area and for extension of service in such area; and

2. Its *complaint* against the Public Service Company of Colorado, herein referred to as "Public Service," wherein Union complains to PUC of alleged unauthorized invasion by Public Service of Union's service area and other alleged illegal acts of Public Service.

On September 22, 1955, Public Service filed its *answer* to Union's *complaint*, urging dismissal thereof, and on the same day filed its *protest* to Union's *application*, urging dismissal thereof. Colorado Central Power Company, herein referred to as "Central," filed its *protest* to Union's *application*, urging dismissal thereof. Neither Public Service nor Central requested affirmative relief.

Prior to taking testimony, PUC divided Union's application into two parts: "Application No. 13576," being Union's request for authority and clarification, and Case No. 5108, being Union's complaint against Public Service Application No. 13576 and Case No. 5108 were consolidated for the purpose of taking evidence. Hearings consumed seventeen days, and spread over the period from September 27, 1955, to September 5, 1956. The testimony consists of over 1500 pages. There are nearly one hundred exhibits. PUC took the matter under advisement and on January 7, 1957, two members of PUC made thirty-three pages of findings, conclusions of law, and entered its order, Decision No. 47074. The third member filed a dissent.

All parties filed petitions for rehearing, pointing out alleged gross errors of PUC in resolving questions contrary to their respective interests and contentions. These petitions were all denied.

The matter was presented to the district court for review by certiorari, each party seeking reversal of some portion of PUC's orders. The district court affirmed Decision No. 47074 in all respects. All parties are here by writs of error, each seeking reversal of some part of the judgment of the district court. We are favored with nine different, carefully prepared, briefs, voluminous, exhaustive and exhausting.

There is little, if any, conflict in the testimony, and none on essential facts.

Public Service and Central and their predecessors in interest had for many years prior to 1936 (the year the Rural Electrification Administration, hereinafter referred to as REA, was created), been engaged as regulated utilities in supplying, among other services, electric service to Denver and to various points in Boulder, Gilpin, Jefferson and Adams Counties (these counties include the area involved herein), which service Public Service and Central claim was rendered in conformity with numerous certificates of public convenience and necessity issued by PUC and the general provisions of the utility laws of the State of Colorado.

Public Service and Central had filed with and had approved by PUC rates for various services rendered and to be rendered in the area involved herein; also charges and terms for extending their facilities to any prospective consumers in said area. Public Service and Central have invested millions of dollars in erecting facilities in the area and to render service therein, all with the sanction and approval of PUC, and have at all times had ample power and facilities to serve the area and have at all times prepared in advance with additional power and facilities adequate to meet any reasonably anticipated increased demands for service in the area.

The record discloses the fact that prior to 1936 large sections of the area and numerous rural residents therein were not being supplied with electricity, the principal reason therefor being the costs of wiring their premises and costs of extending lines into thinly populated areas, which costs had to be paid by the consumers. One reason the costs then appeared prohibitive was the prevailing low incomes of rural residents.

With this background in mind, we find that on May 20, 1936, Congress created the Rural Electrification Administration, an agency of the Department of Agriculture (Title VII, USCA 901-915):

> "* * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy *to persons in rural areas who are not receiving central station service* * * *." (Emphasis supplied).

Throughout the act we find wording which clearly sets forth that the underlying purpose of the act was to make electrical energy available to persons living in rural areas to whom electric energy was not available from central stations of public utility companies.

In 1938, a number of persons living in the area in question formed Union, a nonprofit co-operative corporation, for the purpose of furnishing electric energy to unserved persons in the area and to take advantage of the various subsidies made available by REA. With money, all borrowed from REA, Union constructed a substation and distribution lines, and with power purchased from Public Service, pursuant to contract, commenced serving rural area persons in 1940. Union's certificate of incorporation expressly stated in Article 2 that:

> "* * * the object or objects and purpose or purposes for which the corporation is formed are: (a) to generate

> * * * electric energy *for its members only* and to transmit and distribute * * * such electric energy *to its members only* * * * ; (c) to assist its members to wire their premises * * * ; (f) to do and perform, either for itself *or its members* * * * . *The Corporation shall render no service to or for the public.*" (Emphasis supplied).

The original by-laws of Union clearly state that Union will serve *its members only, that it will not serve the public.* Acceptance by Union of an application for membership and issuance of a membership certificate constituted a contract between Union and the member. Terms of the articles of incorporation and the by-laws dealing with such matters as changes in rates, disposition of profits (which this non-profit organization elects to call "net margins"), minimum monthly charges, the duty of members to purchase all electric energy used on their premises from Union, the lack of duty on the part of Union to supply all of the needs of its members, withdrawal and expulsion of members, accounting practices as designated by REA, ninety days' notice to REA of any proposed changes in rates—terms all of which are foreign to public utility status and operations—constituted a part of the contracts existing between Union and its members and now remain as a part of Union's by-laws and its contracts with its members.

Union from its incorporation in 1938 until May 28, 1955, conducted its affairs pursuant to and in conformity with its articles of incorporation and by-laws, as above set forth; it offered to serve and served its members only. During this period Union repeatedly, and without exception, in court proceedings and proceedings before PUC, went on record as not being a public utility, and successfully questioned the jurisdiction of PUC to exercise any control over it or to regulate its activities in any manner.

In May of 1955, Union amended its articles of incorporation by deleting therefrom the statement:

> "*The Corporation shall render no service to or for the public,*"

and by altering its original avowed purpose to serve "members only" to read "members and customers." Similar changes were made in the by-laws. The total effect of the changes was to grant to Union charter and by-law authority to serve the public—none of the other restrictions and limitations placed on Union or its members, as outlined above, was lifted or altered.

Within a month after making these article and by-law changes, Union filed its complaint and application herein.

Union now unblushingly claims that it has been a public utility from the date of its first business in 1940. It asks to be judged on the basis of what it did, even though contrary to its charter, its by-laws, its loan agreements with REA and, if it were a public utility, in violation of the laws of the state of Colorado, rather than on the basis of what it was authorized to do by its articles and by-laws. It asks that this court ignore the so-called "charter test" and follow the so-called "factual test" in deciding its status during this period prior to amending its articles.

PUC in its opinion in dealing with this problem, in disposing of Union's complaint against Public Service, said:

> "Union argues that in deciding when its facilities became so devoted to public benefit as to warrant protection, notwithstanding that its charter prohibited it from serving the public, we should not limit our consideration to the charter, but should consider all the facts of its operation. To buttress its 'factual test,' it cites many authorities, including two Colorado Supreme Court decisions, which say, on this point, that the substance of the operation, and not the form of the charter, is controlling. In this case, however, the form and the substance are alike; Union did not at any time, at least before October 17, 1955, at the earliest, ever

hold itself out publicly as being willing to serve the public, as distinguished from its members. Its claim that it served the public is not borne out by the evidence. Instances of its attitude and actual practice prior to 1955 are above referred to. In addition, its manager in this proceeding re-affirmed its practice. When Union changed its rate structure in 1950, it did not file its rates with the Commission 'as we were serving members only at that time'."

Union's manager testified:

"Q. Then you didn't hold yourself out to serve the public indiscriminately, did you?

"A. We held ourselves out to serve anyone who wanted service and who would become a member.

"Q. That was a condition, that they become a member?

"A. That is correct.

"Q. Did you serve any non-members at all at any time?

"A. None at all."

PUC further said:

"Counsel for Union says the same, but in a different way:

> 'Union has actively solicited all possible business in its area from the start and has made "membership" a most simple and *almost* automatic procedure.' (Emphasis supplied).

"The cooperative does not say that it held itself out as willing to serve the non-member public. Its claim rests entirely upon the assertion that it never refused membership to anyone, although it concedes it could have. It will thus be seen that on a single set of facts, this cooperative, in 1948, claimed it was not a public utility, and now claims that it is. This does not relieve us of the

burden of determining the truth of the matter; it does leave the cooperative in a rather poor position to deny that we are right. Our view is the same as that of our Supreme Court in the recent case of *Parrish et al. v. PUC:* [134 Colo. 192, 301 P. (2d) 343]

> 'The service to each customer is a permissive service, which creates the distinction between a public utility or a private carrier. The record discloses no dedication of the pipe line by Cobb to the public service, and, as was determined in the City of Englewood v. City and County of Denver, *supra* [123 Colo. 290, 229 P. (2d) 667], this can never be presumed, but must be supported by evidence of an unequivocal intention to make such a dedication. . . . We have no testimony to the effect that Cobb ever made any semblance of an offer to serve the public. The fact that he testified that he never refused a tap to anyone does not change his status.'

"Nor do we believe that the act of changing the charter changed Union's status. This was a private act, taken within the corporation. At most, it only authorized the corporation to serve the public; it did not require such service. It did not amount to a dedication of its property to the service of the public. In *Colorado Utilities Corporation v. P.U.C., et al,* [99 Colo. 189, 61 P. (2d) 820], it was sought to compel a coal company which sold, on a dump basis only any excess power it generated, to serve as a public utility. Our Supreme Court, in finding that the Respondent could not be compelled to serve as a public utility, said:

> 'Moffat Coal Company, under its amended charter, had the power to generate and sell electrical energy, but by such charter it did not have express power to do so as a public utility. However, had its charter contained such express provision, it would not nec-

essarily follow that it is a public utility bringing it within the statutory definition of that term, unless it so acted;'

"In the present case, authority to serve the public prior to the 1955 amendment of its charter, could not even be implied; it was expressly prohibited. There is no evidence that Union took any action between the date its charter was amended and the date the application was filed, to indicate publicly a willingness to serve the public. Even the carefully worded application, filed June 30, 1955, says only that the cooperative 'can now render service to a customer who does not desire to become a member;' nowhere does it say that the cooperative is willing to serve such a customer. It was not serving any on October 17, 1955; the first evidence of serving such a customer was as of February 16, 1956. There being no evidence of a declaration or other public holding out to serve, we must rely on the fact of serving as evidence of the intention. We conclude that the first occasion upon which the cooperative held itself out to the public as being willing to serve the public occurred sometime between October 17, 1955 and February 16, 1956. This holding out, of course, goes simply to show one of the requirements for utility status: intention and willingness to serve. This qualification, standing alone, is not sufficient to endow a company with the protection of statute, as is noted below.

"It is argued elsewhere that the cooperative cannot become a utility, as illegal operations do not justify the granting of a certificate. Our conclusion is that the cooperative did not operate illegally as a utility; it did not operate as a utility at all, until recent date."

We concur in the conclusion of PUC that Union, at the time it filed its complaint and application herein (June 30, 1955), had not been and was not then a public utility as defined in and contemplated by the statutes of the state of Colorado, CRS '53, 115-1-3, concerning public utilities.

This conclusion finds ample support in the evidence presented and the following decisions of this court: *Colorado Corp. v. Utilities Com.*, 99 Colo. 189, 61 P. (2d) 849; *City of Englewood v. Denver*, 123 Colo. 290, 229 P. (2d) 667, and *Parrish v. PUC*, 134 Colo. 192, 301 P. (2d) 343.

In view of the fact that Union had not, at the time it filed its complaint against Public Service, acquired public utility status, it was in no position to complain that Public Service was invading its service area, for, not being a public utility, it had no service area.

That portion of PUC order and that part of the district court judgment holding that Union had no public utility status at the time it filed its complaint and dismissing Union's complaint against Public Service in Case No. 5108 is correct and is affairmed.

We now turn to Union's application for a certificate of public convenience and necessity and PUC's order granting the same.

PUC decided that Union had acquired public utility status sometime between October 17, 1955, and February 16, 1956. It stated that during that period of time arose

> "• • • the first occasion upon which the Co-operative (Union) held itself out to the public as being willing to serve the public • • •.
>
> "We are *now* issuing Union a certificate; it thus becomes entitled to protection from here *forward*." (Emphasis supplied).

In view of the fact that Union desires a certificate with its attendant protections and obligations, the further fact that from the record, briefs and arguments presented by Public Service and Central, it appears that neither objects to, but rather welcomes, the granting of such certificate to render service limited in scope, we find no reason for disturbing this ruling, though it does appear that Union is dis-

criminating against *customers* and in favor of *members*, and its by-laws contain many provisions, as outlined above, that are at variance with public utility operations and may well have to give way to proper regulatory orders of PUC. Now that Union is subject to regulation, such discrimination and other matters pointed out as being contrary to the basic concept of public utility operations can be corrected and eliminated by PUC under its regulatory powers, as set forth in CRS '53, 115-3-2.

We approve of and affirm the action of PUC in granting to Union as of January 7, 1957, a certificate of public convenience and necessity only insofar as it grants to Union authority to render, as a regulated public utility, electric service to its then members and customers, save and except members and customers residing in incorporated towns and cities and in the boundaries of areas previously certificated to Public Service and Central, and to increase the volume of energy it delivers to any then connected member or customer. The PUC may well have concluded that proof of rendition of this service for a long period of time was sufficient proof of public convenience and necessity to warrant the issuance of a certificate to continue the service except for that portion ordered discontinued and the removal of facilities.

PUC directed Union *to remove its facilities* from (a) incorporated towns and cities *in the area;* (b) those portions of *the area* previously certificated to Public Service and Central or their predecessors in interest. Union contends that, even though it may not be entitled to serve in these areas, PUC had no authority to order removal of its facilities, and points out that at least a portion of the facilities ordered removed are an integral part of its electric system and necessary to render service to its present members and customers.

The legislature has granted to PUC very extensive and broad regulatory powers including the power to designate

location of facilities and also relocation or removal thereof. CRS '53, 115-4-2; 115-5-1; 115-5-3. In exercising this power, as in the exercise of any other power granted to PUC, the interests of the public should always be given first and paramount consideration. We feel that the record does not disclose facts which warrant this broad order of removal. Public interest would best be served by an order directing discontinuance of service by Union in the specified areas and removal by Union from said areas of such of its facilities as in any way deter the certificated utilities serving such areas from rendering adequate economical and efficient service thereto.

Though hearings before PUC continued for a year and all parties were granted wide latitude in offering oral and documentary evidence in support of their respective contentions concerning the rights of the patries to make further extensions of facilities and services in *the area*, PUC made no complete or final determination of that question, but left the question unresolved and subject to piecemeal solution by requiring the interested parties to make application for authority to make specific extensions. PUC stated and held that:

> "No showing of public convenience and necessity has been made, sufficient to warrant setting aside an exclusive service territory for Union • • •.
>
> • • •
>
> "We find that the cooperative has failed to show by its evidence that the public convenience and necessity require, or will require, that it be assigned an exclusive service territory; or indeed that the public would benefit at all from such an assignment."

Such holding is in harmony with the record before us; in harmony with all of the testimony heretofore referred to that the area was virtually 100% served; in harmony with the testimony of Union's manager that:

> "I can state it this way: That every bit of our lines were in areas where there were utilities (Public Service or Central)."

It is in harmony with PUC's statement in granting Union public utility status that:

> "If it (Union) would enter the field it must recognize that others (Public Service and Central) are already there; *it must find its place from among the places that remain.*" (Emphasis supplied).

Clearly there were no "places that remain" at the time Union acquired public utility status.

Union contends that Public Service and Central had authority to serve only those areas certificated to them and within the boundaries as set forth in the certificates. Such contention is contrary to the statutes of the state of Colorado and the holdings of this court.

Long prior to Union's birth, Public Service and Central were certificated public utilities rendering service in the area. They, in addition to the authority set forth in their certificates, had the statutory authority to extend their facilities:

> "• • • into territory, either within or without a city and county or city or town, contiguous to its facility or line, plant or system, and not theretofore served by a public utility of like character • • •." CRS '53, 115-5-1.

There can be no doubt that it was the policy of the legislature to make available, at reasonable rates, regulated utility services to the people of the state, and the only limitation placed on expansion into contiguous territory by a certificated utility is that it not expand into an area "theretofore served by a public utility of like character."

As pointed out above, at the time Union acquired public utility status, *the area* was already completely served by extensions made by Public Service and Central. Extensions

made by Public Service and Central, during the time Union was serving members only and holding itself aloof from all control and regulation by PUC, were authorized by statute and valid—they were not extensions into an area "theretofore served by a public utility of like character," for Union was not a public utility of any character.

In *Utilities Commission v. Loveland*, 87 Colo. 556, 289 Pac. 1090, this court said:

> "* * * The record clearly shows, at least the Utilities Commission so found, and properly so we think, and the trial court so determined, that the field or territory which the city attempted to monopolize outside of its own municipal boundaries was just as contiguous to the pre-existing facilities of the Public Service Company as to those of the city. The Service Company was first in the field. The very object of the provisions of the statute applicable here was to prevent, in the interests of the general public, unnecessary duplication of facilities or systems for furnishing the same to customers. When the city became a public utility under the statute, it had no superior right as to territory outside of its municipal boundaries over the rights of any other public utility, private corporation or otherwise, authorized to furnish service."

In *South Suburban Motor Coach Co. v. Levin*, 269 Ill. App. 323, the court said:

> "We think it was not the intention of the legislature to restrict complainant's field or territory to the precise and specific streets and highways named in the certificates. On the contrary, it would seem that necessarily such field or territory must extend to a reasonable distance on each side of its route and beyond its terminal points. * * *
>
> * * *
>
> "We recognize the difficulty of determining by exact definition the meaning of the word 'field' or 'territory'

as applied to operators of public utilities, but defendant does not claim to be a utility at all, and if he did so claim complainant as the first in the field should be given an opportunity to supply any needed service before any other is given the privilege of competing with it. *Egyptian Transportation System v. Louisville & N. R. Co.*, 321 Ill. 580. Any other rule would make it possible to destroy the established utility which it is the very purpose of the act, as we understand it, to protect from destructive competition. *Chicago Rys. Co. v. Commerce Commission*, 336 Ill. 51.

The following language of the Court of Appeals of the state of Missouri is singularly applicable to the case at bar:

"* * * We cannot now after years of diligent regulation permit a company, which through its predecessor, mutual company, by the expediency of unregulated service, by its own method of operation and lesser rates, build itself to important size, and then come before the Commission and urge public convenience and necessity to the detriment and damage of the regulated utility, which down the path of years has been regulated and supervised under the Public Service Law and its property dedicated to public use, without showing that the public utility in the field has failed in the discharge of its duty as above outlined. * * *

* * *

"* * * By the purchase, or conversion to a corporation, the applicant acquired no more than what the Mutual Company had a right to sell, *and when the applicant desired, and undertook, to extend its activities and services into the field of a public utility, it must prove that there existed a public necessity for such service in the area it proposed to serve; and since that area was already being served by a public telephone utility, it was necessary for applicant to prove that the service of*

that utility was not reasonably adequate and satisfactory. We think it failed to meet these requirements."

Peoples Telephone Exchange v. Public Service Commission, 239 Mo. App. 166, 186 S. W. (2d) 531.

The record before us shows, and without any contention by Union to the contrary, that Public Service and Central have for many years been ready, able and willing to render adequate regulated service to the residents of the area. There is a complete absence of proof that any additional service is required or desirable.

In view of the above we must and do conclude that PUC, in ordering that:

> "Public convenience and necessity require that Union be * * * authorized to distribute electricity nonexclusively in the uncertificated and unincorporated portions of the territory described in appendix A (the area)"

arrived at a conclusion which is not in accordance with the evidence, but contrary thereto, contrary to its own findings as set forth above, and contrary to fundamental principles governing public utility operations. Public Service and Central having served *the area* long prior to Union's incorporation have at great expense acquired valuable rights to serve the area, all in conformity with law and with the approval of PUC, and PUC cannot deprive them of their rights nor curtail or limit them in exercising their rights to extend and expand their services in the area so long as such expansion does not impair or endanger service to others or other areas entitled to their service.

Public Service and Central should be permitted to extend their lines in the area in order that they may perform their duty to the public, utilize their property for the purposes to which it has for years been dedicated and without restrictions by PUC predicated on alleged rights of Union claimed by it to have been acquired during its operations prior to gaining public utility status.

As a necessary corollary to the above, PUC has no authority to grant to Union any rights of extension in the area except upon application and proof of the fact that adequate service is not readily available from Public Service or Central and that public convenience and necessity requires that Union render the service requested.

The judgment of the district court is affirmed in part and reversed in part, and remanded with directions to refer the matter back to PUC for further proceedings and orders in conformity with the views herein expressed.

Mr. Chief Justice Sutton, Mr. Justice Moore and Mr. Justice Doyle dissenting.

EXHIBIT D

Dissenting Opinion

No. 18698

PUBLIC SERVICE COMPANY OF COLORADO

v.

THE PUBLIC UTILITIES COMMISSION of the State of Colorado, et al.

MR. JUSTICE DOYLE dissenting:

My disposition is to affirm the judgment of the district court, which judgment affirms the findings of the Commission. The only justified modification made by the majority is that which pertains to removal of lines in the Arvada area. In other respects the Commission's findings are most impressive. The Commission went to great lengths in its efforts to solve a most perplexing problem. It conducted hearings extending over a period of a year and its findings show a scrupulous adherence to the law and a conscientious effort to achieve a practical and equitable disposition of the issues. In view of this, the Court should not set aside well founded findings and well premised conclusions upon the simple basis of lack of sympathy for the cooperative arising from its having evolved as a federally sponsored instrumentality. Such an attitude is apparent in the majority opinion.

The part of the majority opinion with which I am in fundamental disagreement is the determination that the territory in question belongs to Public Service and that Union notwithstanding that it is now a recognized utility cannot further expand. This is contrary to the statute and contrary to the basic principles of utility regulation. In view of this ruling, the holding that Union did not acquire utility status until such time as the Commission recognized it must also be discussed.

The determination that Union is entitled to a Certificate of Convenience and Necessity.

Union contends that notwithstanding that it has operated as a cooperative since 1939 and notwithstanding that it did not apply for a Certificate of Convenience and Necessity until June 30, 1955, that during all of the years of its operation it was in fact a public utility—that it built and extended its lines as a utility and that its facilities now occupy the areas which are here in question and that its recognition as a utility should relate back to 1940. The Commission found as a fact that Union had evolved to utility status but further found that Union's utility status should not be retroactive. The Commission noted, however, that prior to the development of Union "large sections of the area and numerous rural residents therein were not being supplied with electricity, the principal reason therefor being the cost of wiring their premises and cost of extensions in the thinly populated areas."

It is undisputed that Public Service did not during the period in question, from 1940 until 1955, seek to actually develop the rural portions of the Appendix A territory. To be sure, Public Service had lines in the county for the purpose of serving urban centers. Moreover, Public Service held itself out as willing to serve the entire area but it was Union that was to bring service to the farms of the area. Public Service takes the position that the whole of Colorado, with the exception of those parts not being served by other utilities, is contiguous to its territory. So the only difference between the Appendix A area and other parts of the state is that in the former there are some lines. The Commission found this fact and pointed out the realities of the situation as follows:

> "In the present case, each party claims it has been 'serving the territory' in which it operated. The effect of the statute, which is controlling, is discussed below. The statute aside, and from a public viewpoint, how-

ever, 'territory' is not served; only customers—people —are served. The Utilities, if they were serving the territory at the time Union developed and installed its lines, were doing so only in a technical sense. Doubtless, the economic realities of the time made it difficult, if not impossible, for the utilities to serve everyone in the area. The fact is, however, that they did not serve everyone. If they had, Union could never have come into existence; it would have found no one to serve. Union was nurtured on customers the utilities did not serve, and in the case of the Public Service area, this occurred with the existing utilities' help and blessing. The existing utilities' failure to supply all of the needs of their territory, whatever the reason, has now come home to roost. The cooperative is a *fait accompli;* it is in existence, serving customers. The cooperative is there to stay so far as this Commission is concerned."

The evidence at the hearing established that the Union lines are much more prevalent than those of Public Service. The reason that the territory involved was so developed is conceded by the parties to be found in the economic circumstances of the times. Public Service could not bring its lines to the rural areas without prohibitive charges. Consequently there would have been no service in the Appendix A territory had it not been for the formation and development of Union. As indicated by the Commission, Public Service was not too concerned as long as the territory was essentially rural. Its concern developed only after the war and during the period of population influx and growth, at which time it became feasible for Public Service to expand into the Appendix A territory. It was only then that the conflict and competition developed.

As I view it, the refusal of the Commission to recognize Union's public utility status prior to October 17, 1955, is not too significant if the remainder of the Commission's decision to the effect that no one of the parties has exclusive rights in the territory is sustained. In view, however, of the

majority determination that the Certificate is not really a Certificate, then the finding and conclusion of the Commission should receive careful scrutiny. It would appear that the determination of the Commission, that the service rendered by Union was not rendered as a public utility, is based entirely on formal aspects. It is said that Union served its members only, and this point is stressed notwithstanding the testimony that membership was never refused to anyone and notwithstanding the fact that Union entered this sparsely occupied area and brought electricity to some 3,000 outlets while Public Service stood by and merely expressed a readiness to serve. If the test of public utility character is in whether it has dedicated its property to the service of the public and has offered to serve it, it would seem that Union would be more entitled to public utility status in the specific areas than Public Service. Legal formalities are, of course, important in determining character. They should not, however, outweigh the actual facts. If it were shown that Union followed a restrictive policy in taking on new members there would be some substance to the argument, but when it is shown that any individual who desired utility service could become a member, the restrictive suggestion arising from the requirement of membership disappears. The decided cases have recognized that substance rather than form should govern this determination.

In *Davis v. People*, 79 Colo. 642, 247 Pac. 801, this Court affirmed a judgment of the district court enjoining Davis from operating a truck line without a Certificate of Convenience and Necessity. He purported to serve members only of an association. He had a contract binding him to haul for members only but he accepted shipments from non-members to members and from members to non-members. In holding that he was in fact operating as a utility and was thus subject to the law, this Court said:

> "In determining whether a business is that of a common carrier 'the important thing is what it does, not what its charter says.' *Terminal Taxicab Co. v. Kutz,*

et al., 241 U. S. 252, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765. A service may affect 'so considerable a fraction of the public that it is public in the same sense in which any other may be called so * * *. The public does not mean everybody all the time.'

"Had defendant made all, save one, of the shippers of freight in that territory, or all purchasers of postage at any postoffice therein, members of the association, and claimed that such limitation converted an otherwise public into a private carrier, the contention would be so absurd as to be instantly rejected. But the reasons for that rejection would be the identical reasons which demand rejection of defendant's contention in the instant case: (a) The proportion of the public served is so large as to be the public; (b) the limitation is a mere device to hoodwink the law."

Decisions of the Commission which recognize "character of operation" rather than the form of the charter as the test of determining whether the subject was a proper utility are: *Baker v. Lake City L. & P. Co.*, 3 PUR 3d 97, *City of Colorado Springs v. Colo. P.U.C.*, 86 PUR-NS 57. Cases from other states which support the so-called factual test are: *Industrial Gas Co. v. Public Utilities Commission*, 135 Ohio St. 408, 21 N.E. 2d 166 and *Rural Electric Co. v. State Board of Equalization*, 57 Wyo. 451; 120 P. 2d 741; *Arkansas-Louisiana Cooperative v. Arkansas Public Service Commission*, 210 Ark. 84, 194 S.W. 2d 673; *Natural Gas Service Co. v. Surv-Yu Cooperative, Inc.*, 69 Ariz. 328, 213 P. 2d 677, 70 Ariz. 235, 219 P. 2d 324; (cited with approval *Davis v. People, supra*); *Bookhart v. Central Elec. P. Coop.* 219 S.C. 414, 65 S.E. 2d 781; *Consolidated Flower Shipments, Inc v. Civil Aeronautics Board*, (9 Cir. 1954), 213 F. (2d) 814.

In the Wyoming case, cited above *(Rural Electric Company v. State Board of Equalization)*, the Court used the following pertinent language:

"Of course, if the service is rendered pursuant to contract or limited membership, it is difficult to hold that one has expressly held himself out as ready to serve the public generally. But the text does not require an express holding out. It may be done impliedly, as by wide solicitation and other factors . . ." (The Davis case in 79 Colo. 642 is here cited.) 120 P. 2d 748.

"These cases, we think, clearly establish the law to be that merely because an owner enters into contracts in connection with his service, and in some instances refuses service, is not a controlling factor. If that is correct that must be true also in connection with an owner with limited membership, as in the case at bar, since such limited membership is but another form of an attempted limitation by contract."

In the California case, that of *In Re Plumas-Sierra R. Electric Co-op.* 88 PUR-NS 506, the Commission declared:

"The mere declaration of restrictive purposes set forth in its Articles of Incorporation does not preclude a finding that respondent is serving the public. Although it asserts that membership is a prerequisite to service, its readiness to take on new members or patrons, and the statement of its secretary-treasurer that it has never rejected an application for membership, clearly manifests an intention to serve anyone who can be supplied with power by its existing facilities or by reasonable extensions thereof."

If the "fact" test rather than the charter test is followed in the case at bar, there can be no question but that Union is and has been for a long period of time operating as a public utility because it has not only set out to serve the users in the area in question but has aggressively sought new members and has never rejected a member. Moreover, it has actually served while the utility companies stood by waiting for the population to develop so as to make the operation a profitable one. In view of these facts and in view

of the legal principles applicable to recognition of an operation as a public utility, it strikes me as unfair and unrealistic to penalize Union for its failure to obtain recognition as a utility prior to this time.

Public Service emphasizes that this constituted unlawful operation and that something in the nature of the unclean hands doctrine should now bar Union from arriving at a status of a utility. In my opinion, there might be a basis for this contention if Union's recognition did result in prejudice to Public Service. In other words, if Union were now granted exclusive rights within the territory so as to force Public Service to backtrack, the latter would have a legitimate complaint. It could then contend that estoppel operated. The Commission, however, avoided this by refusing to give retroactive effect to the Certificate of Union. Thus it is impossible to conclude that Public Service is aggrieved.

It would follow from an application of the "fact" test that Union was a utility at the time it filed its complaint against Public Service in case No. 5108 and that the Commission should have taken jurisdiction of the controversy. It is apparent from the majority opinion that Union is not considered now as a utility and from the language of the majority it might be inferred that it is considered at best as a second class utility. It would seem that its only reason for affirming the granting of a Certificate to Union is that there is no particular objection to this on the part of the other utilities so long as Union is restrained. I find no basis in the briefs for the observation (in the majority opinion) that neither Public Service nor Central objects to the issuance of a Certificate "to render service limited in scope." Public Service has taken strong exception to the recognition of Union as a utility for any purpose. It has proceeded, and I think correctly, on the premise that it is impossible to recognize Union as a utility (as the majority has) and at the same time (for practical purposes) not recognize it as a utility.

The propriety of the majority holding that even though Union is entitled to utility status it is restricted in its operations to serving the members and customers which it had on January 7, 1957.

The order of the Commission was that none of the parties, that is, neither of the utilities nor Union, had acquired exclusive rights in the so-called Appendix A territory. Acting on this premise and in an effort to treat the parties equitably, the Commission in effect prohibited further expansion on the part of any of the parties without their first obtaining a Certificate from the Commission. On this the Commission stated:

> "Each party asserts that its territory includes all open ground between its lines and the lines of the next utility neighboring. Each aggressively asserts that it now holds itself out to serve, and actually is serving, all of this intervening territory. Their actitivies in seeking new business even to the extent of overbuilding one another, bears them out. *In the present circumstances, we find as fact that indeed all of the parties are aggressively serving the territory in issue in this proceeding,* and that new construction by any party may well interfere with the operation of some other party's facilities. This being true, if all three are regulated public utilities, and they are, by our present decision, then none of them can make any extension without entering territory which is being 'served by a utility of like character.' All extensions will thus require prior authority with the obvious exception of extensions made better to serve existing customers, and extensions within and to areas, including cities and towns, already certificated." (Emphasis supplied)

The Commission noted also that it would not be in the public interest to redistribute lines and customers of the various parties and concluded:

> "* * * If the parties are held in approximate status quo for a time, the ends desired can be accomplished with minimal dislocation and maximum benefit to the public and the parties. Caution must be exercised, of course, not to inhibit growth in the meantime."

Its order authorized extension of service to a distance of 300 feet without certification. Its reasoning in arriving at this conclusion was:

> "Acting in the expectation that the parties will cooperate in an effort to resolve their differences, we should leave a procedural door ajar for them to adjust these differences seriatim at minimum expense, inconvenience and delay. It appears that extension of service by secondary line to a point more than 300 feet distant from the primary line is not economical, nor do such long secondary extensions hold voltage well or provide good service. Any significant change in status will therefore require extension of primary line. Our statute ('53 C.R.S. 115-3-4), concerning rate changes establishes a pattern suitable to our purpose here, when it provides for a filing to be made, to become effective in a specified time unless sooner suspended. We will base our order on such a pattern."

It implemented the above by ordering:

> "All parties shall be permitted, without further authority, to make extension of their facilities, or extensions in the aggregate, which do not exceed 300 feet in length."

A reading of the opinion and findings of the Commission indicates that the matter received careful attention and analysis. The order appeals to me as being equitable in view of the high degree of complexity of the problem which the Commission was required to solve. It would appear that the parties have found it practical as we are told that both Public Service and Union have proceeded to obtain Certifi-

cates (as of the time of the filing of the briefs) in at least 100 instances.

In its brief filed December 31, 1958, Union said:

> "The Commission by the Decision stated that it was holding that all further specific extensions desired by any one of the three public utilities before it would have to be preceded by an application for authority to construct each such extension, and in advance of construction. This part of the Decision is exactly in line with the authority and requirements of the statute. Under this part of the order, the parties have filed about 100 applications for extensions, all pursuant to the Decision, and all involving requests for this sort of certificate. The Commission has acted thereon and the needed extensions have been built to serve new customers, or new locations, by whichever public utility has obtained the certificate from the Commission. So the development of the area has gone forward in an orderly manner under the provisions of the Decision."

The decision of this Court would upset the balance which has been achieved by means of the carefully conceived and equitable formula of the Commission. The effect of the majority decision is that Public Service and Central, within their respective areas, are entitled to exclusive territorial rights and that Union, even though now held to be a public utility by the Commission and this Court, is hamstrung in future operations. Public Service and Central can now go forward without any kind of Certificate and can expand at will regardless of duplications or conflicts with Union. Union, on the other hand, is told that it must stand still—that it cannot acquire new customers; that it cannot extend its facility except upon a showing that "adequate service is not readily available from Public Service or Central"; that its future operations must be in a regulated straight jacket. Thus the only new customers that Union can serve

are the ones that Public Service and Colorado Central find inexpedient to serve.

Apart from its practicable unworkability, the decision is legally untenable in the following respects (among others):

1. This decision cannot be reconciled with the conclusion that Union is a public utility. As a public utility, Union is entitled to all of the rights granted to it by the statute, C.R.S. 53, 115-5-1, which provides that the utility may without the Certificate extend "into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant or system, and not therefore served by a public utility of like character, or for an extension of its business." In allowing Public Service and Colorado Central to extend without Certificates, the majority is in conflict with the last clause of 115-5-1, *supra*, which prohibits extensions which interfere with the operation of other public utilities already constructed. The Commission is, by the majority opinion, effectively enjoined from exercising its statutory duty against Public Service or Colorado Central within the territory in controversy.

2. The interests of the public are supposed to be paramount. The Commission retained jurisdiction of this highly controversial and complex matter in order to administer case to case justice to the parties and so as to provide the public with the best possible service in the area. The Commission no doubt adopted this position in recognition of the fact that Public Service is equipped to serve urban and commercial areas, whereas Union has demonstrated the ability to serve the rural communities. The Commission has indicated that it would be guided by these and other considerations. The majority, however, without legal justification and without regard to the public interest has sweepingly declared that Public Service and Colorado Central have preemptive territorial rights merely upon the basis that they had stood ready to serve.

3. Union argues that our statute does not authorize the granting of territorial certification. They say that our

statute recognizes only three kinds of certificates (1) to begin construction of a system, (2) certification to construct an extension, and (3) certification to operate under a franchise granted to it by a city. No specific provision is made in the statute for an area or territorial certification or for a general certificate, such as here granted. Utility status is a factual determination. They rely on the decision of this Court in *People v. Pirie*, 78 Colo. 361, 242 P. 72. In this case, *Pirie* sought a Certificate of Public Convenience and Necessity to furnish electricity to the residents of Clear Creek County. The Commission enjoined him from operating within the limits of Idaho Springs. The issue arose in the case as to whether the order included territory outside of Idaho Springs. This Court held that the district court properly restricted the Commission's order to Idaho Springs alone. The Court said that the applicant had a right to supply the inhabitants of the county outside of Idaho Springs and as the Colorado Power Company which had a franchise (and presumably a Certificate) to render service in Idaho Springs had not been serving the territory outside, the applicant was free to do so. In disposing of the contention of the Attorney General that the Commission had the authority to exclude the applicant from the entire county, the court speaking through Mr. Justice Campbell said:

> "• • • To the original application by the defendants for the Idaho Springs certificate objection was made by the Colorado Power Company which at the time, as held by the commission, was furnishing satisfactory service to the city and the certificate was refused. We are not now concerned with the denial order if it is restricted to Idaho Springs. As thus restricted it has been sanctioned by us in the case already cited. Assuming, therefore, that Pirie and his successors have not the right to supply the inhabitants of Idaho Springs with electricity, this is not equivalent to saying that they have no right to supply consumers elsewhere in 'territory' outside the municipal limits. The Colorado Power

> Company has not supplied, but it has refused to extend its service to, the town of Dumont and to other consumers in Clear Creek county outside the limits of Idaho Springs. We hold, therefore, that the district court, in restricting the order of the commission to Idaho Springs, was right, and also right in refusing to enjoin defendants from supplying electricity to the consumers in Clear Creek county not within the limits of that city."

The issue in the above case was similar to that here presented in that it refused to recognize an exclusive territorial right based upon mere presence. In other words, merely because a utility declares that it is ready, willing and able to service an area it does not thereby acquire an exclusive right to do so. By holding that Public Service has an area certificate the doctrine of *People v. Pirie, supra* is silently repudiated.

4. By recognizing the territorial rights of Public Service on the basis of an expressed willingness to serve, the Court has in effect reenacted a statute which is popularly known as Section 36 (k) adopted in 1945 and which is reported in Chapter 195, Session Laws 1945. This provision is quoted as follows:

> "No cooperative electric association or non-profit corporation or association shall render electric service in territory already served by electric public utilities, whether the latter be municipally or privately owned or in territory which can be reasonably served by an existing public utility and in which territory such public utility does actually construct lines and agree to serve consumers promptly and within a reasonable time, unless a certificate shall first be obtained from the Commission that such service is in the public interest; provided, however, that nothing herein shall require discontinuance of service to consumers to whom service has been rendered heretofore."

However, in the year 1949 this section was *repealed*. Chapter 204, p. 565, Session Laws 1949.

There can be no question but that Section 36 (k) raised the utility to a dominant position and relegated all cooperatives to a servient status, and the majority ruling accomplishes exactly the same thing while at the same time paying lip service to Union as a public utility. It is fair to assume that the Legislature by repealing Section 36 (k) declared a public policy contrary to the philosophy expressed in 36 (k). I now ask how can the Court conscientiously revive this repudiated philosophy?

5. By adopting a position which is much more far reaching and drastic in its implications and effects than the ruling of the Commission and the district court the majority has now injected into the case basic and fundamental constitutional questions. Furthermore, it has gone outside the issues raised by the briefs in order to do this.

For all of the above reasons, it is my opinion that the decision is ill founded. The Commission's orders and the judgment of the district court should be affirmed with the exception noted above; or in the alternative if it is believed that the Commission's findings are inconsistent in that they failed to recognize the facts indicating Union's utility status prior to 1957 while now recognizing all their installations as those of a utility, I would say that there is ample justification for determining that Union was a utility long prior to the hearings and that Union is entitled to the rights as such which are granted by statute. This would bring about the desired consistency and achieve the Commission's equitable result.

Finally, it should be again repeated that the paramount interest is that of the public. The rights of the parties are important, but these rights must give way when in conflict with the interests of the public. The judgment of the district court and the findings of the Commission recognized this, and should be affirmed.

Mr. Chief Justice Sutton and Mr. Justice Moore join in this dissent.

EXHIBIT E

Judgment Order

No. 18698

Monday, March Fourteenth, A.D. 1960

SITTING EN BANC: (7 Justices)

Whereupon the following proceedings were had and done to-wit:

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation,

Plaintiff in Error,

v.

THE PUBLIC UTILITIES COMMISSION of The State of Colorado, and RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, the individual members of said Commission, UNION RURAL ELECTRIC ASSOCIATION, INC., a corporation, and COLORADO CENTRAL POWER COMPANY, a corporation,

Defendants in Error.

Error to the District Court of
City and County of Denver

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said Court the court now being sufficiently advised in the premises, it is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby affirmed in part and reversed in part in conformity with the conclusions announced in the opinion of this court filed herein, and this cause be remanded to said District Court for further proceedings in harmony with the opinion of the court on file.

EXHIBIT F

Petition For Rehearing

No. 18698

PUBLIC SERVICE COMPANY OF COLORADO a Colorado corporation,

Plaintiff in Error,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, and RALPH C. HORTON, JOHN P. THOMPSON and JOSEPH F. NIGRO, the individual members of said Commission, UNION RURAL ELECTRIC ASSOCIATION, INC., a corporation, and COLORADO CENTRAL POWER COMPANY, a corporation,

Defendants in Error.

Error to the District Court of the City and County of Denver

Honorable Robert W. Steele, Judge

EN BANC . OPINION BY MR. JUSTICE HALL

PETITION FOR REHEARING

Filed on behalf of

UNION RURAL ELECTRIC ASSOCIATION, INC.

GRANT, SHAFROTH, TOLL AND MCHENDRIE
ERL H. ELLIS
730 Equitable Building
Denver 2, Colorado

Attorneys for Union Rural Electric Association, Inc.

PETITION FOR REHEARING BY UNION

Union Rural Electric Association, Inc. (Union) herein states the points it claims have been overlooked; or misapprehended by the Court in the writing of the opinion herein:

1. By remanding this matter to the Public Utilities Commission this Court has acted contrary to statute. Sec. 115-6-15 CRS provides that "the District Court shall enter judgment either affirming, setting aside, or modifying the order or decision of the Commission."

2. The orders of this Court as to Union and its operations depart so far from the orders entered by the Public Utilities Commission as to constitute an entirely new set of regulations, are not modifications of the orders of the Commission, deprive Public Utilities Commission of its delegated power to determine public interest and constitute the exercise by the Court of police powers, all contrary to the State Constitution and the basic intent of the Public Utilities Commission Act.

3. By holding that the words in the Federal Statute "persons in rural areas who are not receiving central station service" mean "persons living in rural areas to whom electrical energy was not available from central stations" this Court has placed an erroneous interpretation upon a Federal Statute which amounts to a rejection of rights, privileges, and immunities existing in and claimed by Union under State and Federal Constitutions.

4. This Court has held that a series of provisions in the contracts between Union and its Members are foreign to public utility status, but such contracts were not challenged before the Public Utilities Commission, nor in the decision of the Public Utilities Commission, nor discussed in briefs filed herein. This decision deprives Union and its Members of their contract rights without a hearing and without due process of law, and impairs the obligation of contracts contrary to the State and Federal Constitutions, such contracts being not only contracts between Union and its Members, but contracts between Union and the United States of America under which latter contracts large amounts of the funds of the United States have been loaned to Union and pursuant to which mortgages in favor of the United States have been placed upon the properties of Union.

5. The Court has stated that the grant of a limited certificate to Union is based upon (a) the fact that Union desires such a limited certificate, and (b) that Public Service does not object but rather welcomes such grant. If these be legal grounds for determining public conveniences and necessity, the facts do not support the statement of the Court. Union never requested nor desired the type of certificate granted by the Public Utilities Commission, and certainly not the one defined by this Court. The chief and positive position taken by Public Service (see page 23 of its opening brief) was that there was no evidence supporting the grant of *any* certificate to Union.

6. The basic decision of this Court is that a special kind of certificate shall be granted to Union, which means that Union is to be regulated but shall have no rights as a public utility. This is contrary to the statutory law of the State, is contrary to the basic conception that regulation is excused only by attendant advantages and territorial protection, and is a denial of the equal protection of the laws and is both a denial of due process and the taking of property without due process contrary to the provisions of the Constitutions of Colorado and the United States.

7. This Court has ordered that Union shall be regulated as a public utility despite the many "findings" of this Court that Union does not qualify as a public utility under the law.

8. This Court has in effect declared that Union may serve only those persons who were being served on January 7, 1957, and that no new customers may ever be obtained by Union. Any change by death, by transfer, or otherwise in ownership works a loss of a 1957 customer, so that this Court has decreed that Union shall slowly go out of business and be deprived of its business and properties. Such deprivation of property rights is a denial of the equal protection of the laws and a taking of property without due process under the State and Federal Constitutions, affecting not only Union and all of its Member-owners, but also its mortgagee, the United States of America.

9. This Court has made findings of fact, to the effect that there were no places for Union as a public utility to serve in the future, and that the area in question was completely served by extensions made by Public Service and Colorado Central. This is contrary to the findings of the Commission, and is contrary to fact as the entire Record shows. It is also inconsistent with the statement by this Court in its opinion that those public utilities should be permitted to make extensions into the area. It is also contrary to the statutory rule that findings of fact by the Commission are binding upon the Courts.

10. This Court has stated that Union is claiming rights allegedly acquired prior to its gaining public utility status; and the Court for that reason made its order that Public Service and Colorado Central may make extensions without restrictions by PUC and free from the applicable statutes of Colorado, which statutes do limit the rights of extension of any public utility. Union, while claiming an earlier public utility status than has been allowed, has at all times clearly based its application, complaint, and arguments upon the clear ground that when it did become a public utility it then had a right to the protection given all public utilities by the Colorado statutes. To deny Union that common right is contrary to the State and Federal Constitutions guaranteeing equal protection under the law and due process, and is a taking of its property without due process of law.

11. The Court interprets the public utilities statute as permitting classification of public utilities based on:

a. Time public utility operations commenced as against commencement of public utility operations by others;

b. Fact that prior to assumption of public utility status facilities were operated on a cooperative and legal basis; and

c. Fact that financing was obtained from federal government through REA;

none of which grounds justifies the adversely discriminatory classification and treatment of Union under either the State Constitution or the 14th Amendment of the Federal Constitution.

Respectfully submitted,

GRANT, SHAFROTH, TOLL AND MCHENDRIE

ERL H. ELLIS

Attorneys for Union Rural Electric Association, Inc.

EXHIBIT G

Rehearing Denied

No. 18698

Monday, April Eleventh, A.D. 1960

THE FOLLOWING FURTHER PROCEEDINGS WERE HAD BY THE COURT SITTING EN BANC:

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation,

Plaintiff in Error,

v.

THE PUBLIC UTILITIES COMMISSION of the State of Colorado, etc., et al.,

Defendants in Error.

Error to the District Court of
City and County of Denver

The court having considered the petition for rehearing of defendants in error, the Public Utilities Commission of the State of Colorado and the individual members of said Commission and the petition for rehearing of defendant in error, Union Rural Electric Association, Inc., in said cause, and being sufficiently advised in the premises, it is this day ordered that said petitions be, and the same hereby are, denied.

LF COPY

Supreme Court of the United States

BRIEF OF RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

INDEX

	Page
Statement	2
Reasons for Denying the Writ	6
Conclusion	10

CITATIONS

Cases:

Baur v. Scott, 233 U.S. 658	9
Brown-Forman Co. v. Kentucky, 217 U.S. 563	6
Herndon v. Georgia, 295 U.S. 441	8, 9
Munn v. Illinois, 94 U.S. 113	7
People of the State of New York v. McCall, 245 U.S. 345	7
Radio Station WOW v. Johnson, 326 U.S. 120	7
Rast v. Van Deman & Lewis Co., 240 U.S. 342	6
Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372	7

Statutes:

Colorado Revised Statutes, 1953, 115-1-3	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 167

UNION RURAL ELECTRIC ASSOCIATION, INC., *Petitioner*,

v.

PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, members of said Commission; and COLORADO CENTRAL POWER COMPANY; *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

Without the benefit of a citation to a single decision of this Court, the petition asserts that six federal questions are presented by the holding of the Supreme Court of Colorado that petitioner, a public utility, was not entitled, as a matter of right under state law, to extend its electric facilities to serve additional customers in an area already served by two pre-existing public utilities. The basis for this holding was "a complete absence of proof that any additional service is

required or desirable." (Pet. App. p. 68a.) Moreover, "as a necessary corollary" the Supreme Court correctly ruled that the Public Utilities Commission of Colorado

> "has no authority to grant to [petitioner] any rights of extension in the area except upon application and proof of the fact that adequate service is not readily available from Public Service or Central and that public convenience and necessity requires that [petitioner] render the service requested." (Pet. App. p. 69a.)

The decision of the Supreme Court of Colorado not only correctly states the basic, universal law relating to certification of public utilities, but also is in complete conformity with the Colorado statute on the question. (C.R.S. '53, 115-4-2, Pet. App. p. 3.) On the basis of its decision, the Supreme Court of Colorado has remanded the cause for proceedings covering any future proposed extensions of facilities by petitioner in which petitioner may make application and submit "proof of the fact that adequate service" is not already available and that "public convenience and necessity require that [petitioner] render the service requested."

STATEMENT

The six elaborate questions propounded in the petition fail to survive a statement of the case, which has its origin in the fact that since long prior to 1936, the area to the immediate northeast of Denver, Colorado, has been supplied with electric service by two regulated public utilities, respondent Public Service Company (hereafter Public Service) and Colorado Central Power Company (hereafter Central). In 1938, with money borrowed from the Rural Electrification Administration, petitioner was formed for the specific

purpose of providing additional electric service in the area to "members only under a cooperative form of membership." Petitioner constructed a substation and distribution lines and actually commenced serving a few members living in the area in 1940.

During the following fifteen-year period, which coincided with the period of the area's substantial growth, petitioner continued to expand its facilities in the area served by regulated utilities and resisted each and every attempt of the Colorado Public Utilities Commission to subject it to regulation as a public utility. As a result, during this period petitioner was able to expand its electric system and furnish electrical service to its members in the area on a non-certificated, non-exclusive and non-regulated basis. (Pet. App. pp. 19a-22a) By 1955 petitioner had completed the construction of its desired electric system. In order to obtain the territorial protection for such a system that is afforded regulated public utilities, petitioner decided to change its method of operation from that of a non-regulated cooperative to a regulated public utility. Thus, in May of 1955 petitioner amended its articles of incorporation and by-laws so as to permit it thereafter to serve the public in general as well as its members. The following month petitioner initiated this proceeding by asking the Commission to disregard its fifteen-year history of denying it was a public utility and its non-utility operations, and, instead, to regard it as having been a certificated public utility since 1940. (Pet. App. p. 58a.) Its application requested a certificate of public convenience and necessity granting it a service monopoly in the entire contested area, and unlimited authority to extend at will therein in the future.

After lengthy hearings, which continued for over a year and in which Public Service and Central participated, the Colorado Public Utilities Commission on January 7, 1957 approved petitioner's application to be certificated as a public utility, effective as of that date and not as of 1940. The Commission found that the "first occasion" upon which petitioner had demonstrated the willingness and ability to serve as a public utility occurred sometime between October 17, 1955 and February 16, 1956. The Commission refused to allow petitioner to serve areas already certificated to other public utilities and ordered petitioner to remove its lines, wires and other facilities from such areas. However, the Commission allowed petitioner to continue its existing non-exclusive service and in addition the Commission permitted petitioner to extend its services in non-certificated areas already being served by Public Service.

The findings and orders of the Commission were appealed to the District Court In and For the City and County of Denver. On April 25, 1958, the position of the Commission was affirmed by the Court in all respects. The cause was then taken to the Supreme Court of Colorado and on March 14, 1960, the decision of the District Court and that of the Commission were, so far as is relevant here, affirmed except that the Supreme Court of Colorado found there was "a complete absence of proof that any additional service is required or desirable." On the basis of this finding, the Colorado Supreme Court concluded that the Commission had erred in authorizing petitioner to extend its services in the non-certificated areas without ". . . proof of the fact that adequate service is not already available from Public Service or Central and

the public convenience and necessity requires that [petitioner] render the service requested."

The Colorado Supreme Court also noted that it followed as "a necessary corollary" that Public Service and Central be permitted to extend their facilities to serve future customers in the area in conformity with the Colorado statute involved. According to the Court:

> "Public Service and Central having served *the area* long prior to [petitioner's] incorporation have at great expense acquired valuable rights to serve the area, all in conformity with law and with the approval of PUC, and PUC cannot deprive them of their rights to extend and expand their services in the area so long as such expansion does not impair or endanger service to others or other areas entitled to their service." (Pet. App. p. 68a.).

In order that petitioner may have the opportunity to show that additional service is required for which adequate service is not available, the cause has been remanded to the Colorado Public Utilities Commission.

The above modification made by the Supreme Court of Colorado is the sum and substance of the six allegedly federal questions raised by petitioner. Despite petitioner's admission that the Supreme Court of Colorado did precisely that which it had been asked to do by respondent Public Service in its brief and argument (Pet. App. p. 12), the first suggestion that the modification might raise federal questions was made in a petition for rehearing that was summarily denied by the Supreme Court of Colorado on April 11, 1960.

REASONS FOR DENYING THE WRIT

The petition presents no reason for granting the writ. As petitioner itself concedes (Pet. p. 11), it would "limit its characterizing of the decision below to the accepted word 'erroneous' had not [the dissent] adopted more forceful descriptions. . . ." Although the petition is replete with "forceful descriptions," it presents no federal question; no federal question was properly raised or framed below; and the decision below is not final.

(1) Petitioner's basic complaint is that because it has been certificated as a regulated public utility, as of 1957, it is constitutionally entitled to be treated as if it had been so certificated as of 1940. Petitioner with newly achieved status of a public utility wishes to be regarded as having the same history, investment and function in the area as have Public Service and Central. However, all three state tribunals found the undisputed evidence to be that not only was petitioner completely different from Central and Public Service, but the difference was of petitioner's own choice and making. What petitioner ignores is that the recognition of reasonable differences is a necessary corollary of and not a denial of equal protection. *Brown-Forman Co.* v. *Kentucky*, 217 U.S. 563. *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342.

By a parity of reasoning, petitioner's argument that it has been denied due process also fails. The classification between public utilities on the basis of history, investment, function and policy being a justifiable one, surely it is within the power of the state to make such a classification and act upon it. The state may, therefore, require petitioner to eat its newly acquired cake and establish the facts necessary to en-

title it to a certificate of public convenience and necessity to make future extensions in an area already served. Indeed, if, as petitioner contends, every public utility had an absolute right to expand its services to an area already served by existing utilities regardless of public convenience and necessity, the purpose of public utilities regulation would be nullified." Perhaps because of its youth as a utility, petitioner has yet to learn that public utilities have been subjected to the police power and the laws of the respective states within which they operate with the approval of this Court for well over 100 years, and that all constitutional questions relating to the power of the states to regulate have been resolved in favor of regulation so consistently as no longer to raise any question. *Munn* v. *Illinois*, 94 U.S. 113, *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U.S. 372.

Petitioner complains that the effect of the decision of the Colorado Supreme Court is to force it out of business. This is not true. The decision below granted petitioner a certificate of public convenience and necessity to continue its existing business. The only restriction imposed by the Supreme Court of Colorado is on petitioner's right to construct future extensions of electric facilities. The power so to restrict extensions and construction of facilities by public utilities has long been a valid and incidental part of the power to regulate. *People of the State of New York* v. *McCall*, 245 U.S. 345.

(2) The questions presented in the petition were first raised below in a petition for rehearing that was summarily denied. Such questions come too late for consideration here. *Radio Station WOW* v. *Johnson*,

LEGEND

This MAP illustrates the Application for a Writ of Certiorari filed by Union Rural Electric Association, Inc., with the Supreme Court of the United States.

It is not a copy of any one Exhibit in the Record.

It is a composite of Exhibits Nos. 24, 26, and V-1 of the Record, and contains most of the data on those Exhibits in a combined form. However, no transmission lines are shown.

The STIPPLED areas constitute the Appendix A Territory to which the orders and judgments have applied.

——— The RED lines are the 1955 electric distribution lines of Union Rural Electric Association, Inc. [Ex. V-1].

——— The GREEN lines are the 1955 electric distribution lines of Public Service Company of Colorado, [Ex. 26]. The broken or dotted green lines show those lines of Public Service Company in 1955 most recently constructed, [Ex. 24]. Solid green areas show some of the municipalities served by Public Service Company.

——— The PURPLE lines are the 1955 electric distribution lines of Colorado Central Power Company, [Ex. V-1]. The solid purple areas show municipalities served by Colorado Central.

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——— The PURPLE lines are the 1955 electric distribution lines of Colorado Central Power Company, [Ex. V-1]. The solid purple areas show municipalities served by Colorado Central.

326 U.S. 120; *Herndon* v. *Georgia*, 295 U.S. 441. The only exception to this rule arises when the decision of the highest court may be said to have come as such a surprise that a federal question could not have been foreseen prior to the decision. Petitioner may make no claim of surprise here. Petitioner concedes that respondent Public Service asked the Supreme Court of Colorado to make the very modification of which federal complaint is now made.[1] In petitioner's own words,

> "[T]he basic claim by Public Service upon which its review was sought was that the PUC had granted to [petitioner] a certificate to serve electrical energy in areas where Public Service had established rights through certificates and long establishment of lines, all without any showing to the PUC that the grant of the certificate would serve the public convenience and necessity." (Pet. 12)

In view of the fact that the court below merely agreed with the written and oral arguments presented by Public Service, the only surprise to petitioner was that usually experienced by a litigant when its opponent's views prevail. Refusal to allow petitioner to extend its facilities in areas already served was not only foreseeable, it was a necessary corollary to the findings which were made by the Commission that the area in question was already being served by two long-established public utilities, and that there was a complete absence of proof of need for any additional service. Moreover, no federal question was properly framed below. In its petition for rehearing, petitioner was content to do no more than characterize the decision of

[1] Pages 91-99 of the opening brief and pages 52-64 of the reply brief filed by Public Service in the Supreme Court of Colorado.

the Supreme Court of Colorado as being "without due process of law," "contrary to the state and federal constitution," "a denial of due process," and "contrary to the provisions of the constitutions of Colorado and the United States." Such general broadsides are not sufficient to frame a federal question. *Herndon* v. *Georgia, supra; Bowe* v. *Scott*, 233 U.S. 658.[2]

(3) The decision of the Colorado Supreme Court lacks the finality requisite to review by this court. Although the right of petitioner to continue its present operations was affirmed, the cause has been remanded to the Colorado Commission for the purpose of determining if public convenience and necessity justifies *future extensions* by petitioner as the need arises. Until this is done, the decision below cannot be regarded as final.

[2] There is no possible ambiguity in the record on this point. Thus, the jurisdictional defect is not cured by the certificate of existence and decisions of a federal question executed by the presiding justice of the Supreme Court of Colorado. In addition, it may be noted that the description of the purported federal questions contained in the certificate is even more vague, uncertain and subject to conjecture than the description set forth in the petition for rehearing itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GERHARD A. GESELL
701 Union Trust Building
Washington 5, D. C.
Counsel for Respondent Public Service Company of Colorado

BRYANT O'DONNELL
Lee, Bryans, Kelly & Stansfield
1044 Gas and Electric Building
Denver 2, Colorado

ROBERT L. RANDALL
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 167

UNION RURAL ELECTRIC ASSOCIATION, INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, AND JOSEPH F. NIGRO, MEMBERS OF SAID COMMISSION; AND COLORADO CENTRAL POWER COMPANY;

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF OF RESPONDENT COLORADO CENTRAL POWER COMPANY

SEYMOUR O'BRIEN,
10 Light Street,
Baltimore 2, Maryland,
Counsel for Respondent,
Colorado Central Power Company.

PHILIP A. ROUSE,
322 Majestic Building,
Denver 2, Colorado,

MILES AND STOCKBRIDGE,
10 Light Street,
Baltimore 2, Maryland,
Of Counsel.

The Daily Record Co., Baltimore 2, Md.

INDEX

	PAGE
I. INTRODUCTION	1
II. ARGUMENT	2
A. Federal questions, if any, were not timely and properly raised so as to give this Court jurisdiction to review the decision on Writ of Certiorari	2
B. The Colorado Supreme Court has not decided a federal question of substance	4
C. The decision of the Colorado Court is in harmony with the applicable decisions of this Court	5
III. CONCLUSION	6

CITATIONS

Cases:

Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 596	4
Frost v. Corporation Commission, 278 U.S. 515	5
Hebert v. Louisiana, 272 U.S. 312	5
Hulbert v. Chicago, 202 U.S. 275	3
Radio Station WOW v. Johnson, 326 U.S. 120	2
Stembridge v. Georgia, 343 U.S. 541	3

Statutes and Rules:

Colorado Revised Statutes, 1953, 115-6-15	3
Colorado Rules of Civil Procedure, Rule 118	2
Supreme Court Rules, Rule 19	5

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF OF RESPONDENT COLORADO CENTRAL POWER COMPANY

I.

INTRODUCTION

This Reply Brief is filed by Respondent Colorado Central Power Company in opposition to the granting of the Petition for a Writ of Certiorari to the Supreme Court of the

State of Colorado. Clarification of some factual matters are included within the appropriate subjects of argument.

II.

ARGUMENT

A. FEDERAL QUESTIONS, IF ANY, WERE NOT TIMELY AND PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE DECISION ON WRIT OF CERTIORARI.

The federal questions now suggested by Union Rural Electric Association, Inc., are raised for the first time in this Court. Union acknowledges on page 10 of its petition that it originally suggested the constitutional questions in its petition for rehearing before the Colorado Supreme Court. This attempt was ineffective as the federal questions constituted new subjects which could not be raised for the first time upon a petition for rehearing. Rule 118 of Colorado Rules of Civil Procedure provides:

> "A petition for rehearing shall . . . briefly state the points claimed to have been overlooked or misapprehended by the Court with proper reference to the particular portion of the record and briefs relied upon.
>
> * * * * * *
>
> "No answer will be permitted and no action will be taken save to grant or deny the rehearing."

Since the federal questions were suggested for the first time in the petition for rehearing, the questions could not have been overlooked or misapprehended. As these questions were not proper subjects of a petition for rehearing, the attempt to raise them on the petition for rehearing was a nullity under state law and is not a basis for the granting of the petition herein. *Radio Station WOW v. Johnson*, 326 U.S. 120.

Union failed to raise the constitutional questions now suggested even though admonished to do so by Colorado Statute:

> "The review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of Colorado, and whether the order of the Commission is just and reasonable and whether its conclusions are in accordance with the evidence." C.R.S. '53, 115-6-15.

Having failed to comply with the procedural requirements in the Colorado District Court as prescribed by statute and in the Colorado Supreme Court as prescribed by rule, Union has no standing in this Court. *Hulbert v. Chicago*, 202 U.S. 275.

The Colorado majority opinion recites substantial and complete non-federal grounds for sustaining the decision; however, failure of Union to comply with the Colorado Statutes and Rules is an adequate state ground to support the Colorado decision in denial of the petition herein. *Stembridge v. Georgia*, 343 U.S. 541.

After suggesting questions raised by the Colorado decision, Union states on page 11 of its petition herein:

> "The dissenting opinion (of the Colorado Court) constitutes a fairly complete brief on behalf of Union."

This "fairly complete brief" is devoid of any reference to any federal question. The dissenting opinion appearing on pages 70a through 83a of Union's petition herein negatives Union's contention that federal questions are involved.

The "Certificate of Existence and Decision of Federal Question" which the petitioner filed herein some weeks

after its Petition adds nothing of substance. This Certificate by the Colorado Chief Justice, who was one of the dissenters to the Colorado decision, constitutes a cursory recitation that some questions were discussed. Even if this Certificate should be considered, its contents amounting to perfunctory recitations are insufficient to qualify a federal question. *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 596. Other statements as to what language the majority and minority opinions of the Colorado Court actually contain are superfluous. Apparently the Certificate does constitute an acknowledgment by the petitioner Union that the record before this Court is deficient for the granting of a writ of certiorari.

B. THE COLORADO SUPREME COURT HAS NOT DECIDED A FEDERAL QUESTION OF SUBSTANCE.

It is necessary to view Union's petition in the proper perspective. Union is no longer a rural cooperative in competition with public utility companies. Union voluntarily changed its status to that of a public utility company subject to regulation by the Public Utilities Commission of the State of Colorado. Therefore, Union's petition improperly represents the effect of the Colorado Supreme Court decision. Those rural cooperatives which do not petition to become public utilities are not affected. Those rural cooperatives which are not in conflict with public utility companies are not affected even though they petition to become public utility companies. The Colorado decision affects only Union, a former R.E.A. cooperative, which has an operation in conflict with two other electric public utility companies in the north Denver area.

The questions determined by the Colorado Commission and Courts involve regulation of the conditions existing in the area north of Denver caused by the overlapping op-

erations of three electric public utility companies. These are essentially local problems concerning the utility service in the area north of Denver. There is presented the familiar regulatory question as to which of several public utility companies should be permitted to serve a contested area. Such questions are for determination by the Public Utilities Commission of Colorado. No federal question is involved.

C. THE DECISION OF THE COLORADO COURT IS IN HARMONY WITH THE APPLICABLE DECISIONS OF THIS COURT.

The principles involving state public utility regulation and the rights of a public utility have been recognized by this Court. *Frost v. Corporation Commission*, 278 U.S. 515. Although the Colorado Court has not decided a federal question involving these subjects, the decision of the Colorado Court is in harmony with these established principles.

Union's petition has failed to comply with the provision of Section 1(a) of Rule 19 of this Court which prescribes the character of reasons to be considered in the granting of a writ of certiorari to a state court. Union has not indicated any federal question of substance decided by the Colorado Court which has not heretofore been determined by this Court. Union has not indicated any federal question of substance determined by the Colorado Court which is probably not in accord with applicable decisions of this Court.

Interpretation of the Colorado Statutes by the Colorado Court upon which the Colorado decision is based does not involve a federal question. Construction of these Colorado Statutes is a state question, the final decision of which rests with the Colorado Supreme Court. *Hebert v. Louisiana*, 272 U.S. 312.

III.

CONCLUSION

The Colorado Court has not decided a federal question of substance not heretofore determined by this Court nor has the Colorado Court decided any federal question not in accord with the applicable decisions of this Court. The subject Colorado decision is based upon the substantive and procedural law and rules of the state without involvement of a substantial federal question. To permit Union to submit federal questions to this Court in circumvention of the state court would violate the Rules of this Court. The petition for a writ of certiorari to the Supreme Court of the State of Colorado should be denied.

Respectfully submitted,

SEYMOUR O'BRIEN,
10 Light Street,
Baltimore 2, Maryland,
Counsel for Respondent,
Colorado Central Power
Company.

PHILIP A. ROUSE,
322 Majestic Building,
Denver 2, Colorado,

MILES AND STOCKBRIDGE,
10 Light Street,
Baltimore 2, Maryland,
Of Counsel.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 167

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PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, members of said Commission; and COLORADO CENTRAL POWER COMPANY;
Respondents.

PETITIONER'S REPLY BRIEF TO BRIEFS IN OPPOSITION TO APPLICATION FOR CERTIORARI

MORRISON SHAFROTH
Attorney for Petitioner
730 Equitable Building
Denver 2, Colorado

INDEX

ARGUMENT

		Page
1.	The Federal Questions were properly raised to give this Court jurisdiction	1
2.	The State decision is final in fixing the authority of the PUC	2
3.	Corrections of some statements found in opposition briefs	3
Appendix A.	The Certificate from the Supreme Court of Colorado	5
Appendix B.	Colorado Statute, 115-5-1 CRS-1953	8

CITATIONS

Cases:

Consolidated Co. v. Norfolk Co., 228 U. S. 596	2
Herndon v. Georgia, 295 U. S. 441	2

Statute:

Colorado, 115-5-1, CRS-1953	8

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Respondents.

PETITIONER'S REPLY BRIEF TO BRIEFS IN OPPOSITION TO APPLICATION FOR CERTIORARI

ARGUMENT

1. THE FEDERAL QUESTIONS WERE PROPERLY RAISED TO GIVE THIS COURT JURISDICTION

The Supreme Court of Colorado has issued its certificate concerning the existence of federal questions. Such certificate is set forth for convenience as Appendix A hereto.

It is not too late to raise federal questions by a petition for rehearing, if that petition presented the first opportunity for raising the questions and if the State court

actually entertained such questions and determined them. *Herndon v. Georgia*, 295 U. S. 441. The certificate from the court herein recites that the federal questions arose for the first time upon publication of the opinion of the State court. The certificate also shows that the questions were presented by the petition for rehearing, were considered, and were decided. This is sufficient. *Consolidated Co. v. Norfolk Co.*, 228 U. S. 596.

The fundamental attack by Public Service upon the decision of the PUC was that there had been no showing to support the grant of a certificate to Union. But the State Supreme Court did not hold that the certificate was improper for want of proof of public convenience and necessity, as Public Service urged. Instead, it affirmed and approved the granting of a certificate. Then the State court did something not suggested to it by any party and therein arose the federal questions for the first time.

The State court said that Union was a public utility but that it did not have the rights given by the Colorado statute to such utilities. The Colorado Statute (115-5-1, see Appendix B herein) in effect gives every public utility protection against the encroachment of another public utility into the territory of the first. This is the anti-duplication policy of Colorado.

But the State Supreme Court in effect stated that Public Service and Colorado Central had predominant rights to build lines wherever they might wish, without compliance with the Colorado statute, and that Union could never serve a new customer. No such remarkable decision, at complete variance with legislative provisions and policy, could be reasonably anticipated.

2. THE STATE DECISION IS FINAL IN FIXING THE AUTHORITY OF THE PUC.

The substance of the State court decision is in the last four paragraphs of the opinion (Application pp. 68a-69a.)

PUC is told that it cannot deprive nor curtail Public Service and Colorado Central in the exercise of their rights to build anywhere irrespective of Union's lines and service. It is this that is directly contrary to the Colorado Statute and to the whole theory of regulation.

The only exception to this is that through some future and new application to the PUC and under proof in a new hearing there might arise a case where Union could be allowed to serve some person it was not serving in 1957. This in no sense affects the finality of the determinations that have been made by the State Supreme Court.

3. CORRECTIONS OF SOME STATEMENTS FOUND IN OPPOSITION BRIEFS.

It is not petitioner's basic complaint herein that "it is constitutionally entitled to be treated as if it had been so certificated as of 1940." It is petitioner's contention that to declare it a public utility in 1957 but to then say it had no rights as a public utility under the Colorado law was a denial of due process and the taking of its property.

It is incorrect to state that the "only restriction imposed by the Supreme Court of Colorado is on petitioner's right to construct future extensions." The State court decision limits petitioner to service to customers (persons) existing in 1957, no matter who it may be serving now and no matter what changes occurred after 1957, or may occur hereafter, in occupancy of places served in 1957.

It is stated in one of the briefs in opposition that during the period 1940-1955 petitioner "resisted each and every attempt of the Colorado Public Utilities Commission to subject it to regulation as a public utility." (Public Service, p. 3). There is nothing in the decision of the PUC to substantiate this broad statement. There are only statements about the various proceedings that were brought before the

PUC and later dismissed. The PUC never made any decision or order in that period that was directed against Union or suggested its regulation.

MORRISON SHAFROTH
Attorney for Petitioner
730 Equitable Building
Denver 2, Colorado

September, 1960

APPENDIX A

CERTIFICATE AS TO EXISTENCE OF FEDERAL QUESTIONS

IN THE
SUPREME COURT OF THE STATE OF COLORADO

No. 18698

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation,
Plaintiff in Error,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, and RALPH C. HORTON, JOHN P. THOMPSON and JOSEPH F. NIGRO, the individual members of said Commission, UNION RURAL ELECTRIC ASSOCIATION, INC., a corporation, and COLORADO CENTRAL POWER COMPANY, a corporation,
Defendants in Error.

Error to the District Court of the City and County of Denver
Honorable Robert W. Steele, Judge

CERTIFICATE OF EXISTENCE AND DECISION OF FEDERAL QUESTION

On motion of Union Rural Electric Association, Inc., one of the defendants in error, this Court orders it to be certified and made a part of the judgment heretofore rendered and made herein, that in the prosecution of error from the

District Court of the City and County of Denver the following matters existed in connection with the presentation of a Federal Question:

1. There was no mention of a Federal Question in the briefs of the parties nor in oral argument presented by the parties before this Court.

2. The first suggestion of a Federal Question was during the discussions of the Justices of this Court as to the judgment to be rendered. The possibility that the judgment as proposed by the majority of the Court would contravene due process of law was raised by some of the Justices of this Court and the matter received consideration, but such objections were overruled by the majority of the Court.

3. The existence of Federal Questions was pointed out in the minority opinion of this Court.

4. Upon publication of the opinions of this Court a Federal Question arose for the first time.

5. The Petition for a Rehearing filed by Union Rural Electric Association, Inc., raised and relied upon the existence of Federal Questions and set forth that it was the claim of such petitioner that the judgment of this Court violated the rights of such petitioner as guaranteed by the Constitution of the United States.

6. The said Petition for Rehearing was carefully considered by this Court, the contentions relative to the denial of due process and taking of property and contract rights without due process, as urged by Union Rural Electric Association, Inc., were the subject of discussion among the Justices of this Court, and the denial of the petition for

rehearing was a determination that the Federal Questions raised should be and were decided against said petitioner.

Dated July 14, 1960.

THE SUPREME COURT OF THE
STATE OF COLORADO

By Leonard B. Sutton,
Its Chief Justice

APPENDIX B

THE STATUTE OF COLORADO APPLICABLE TO EXTENSIONS BY ALL PUBLIC UTILITIES

115-5-1. New Construction—extension. No public utility shall begin the construction of a new facility, plant or system, or of any extension of its facility, plant or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 115-5-1 to 115-5-4 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any such public utility, in constructing or extending its line, plant or system shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions, or prescribing such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable.